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Aboriginal Self-Government

Legal and Constitutional Issues

Royal Commission on Aboriginal Peoples



ABORIGINAL SELF-GOVERNMENT

LEGAL AND CONSTITUTIONAL ISSUES

PATRICK MACKLEM

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ABORIGINAL SELF-GOVERNMENT LEGAL AND CONSTITUTIONAL ISSUES

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NORMATIVE DIMENSIONS OF THE RIGHT OF ABORIGINAL SELF-GOVERNMENT

by Patrick Macklem

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EXECUTIVE SUMMARY

This paper describes and assesses five perspectives in support of the right of Aboriginal self-government: prior occupancy, prior sovereignty, treaties, self-determination, and preservation of minority culture. It cautions against sole reliance on positive law to justify recognition of the right of Aboriginal self-government, but recognizes the limitations of normative argument in the face of the contingency of social thought. The paper argues that each perspective expresses unique truths about the nature of Aboriginal rights, but that reliance on one perspective to the exclusion of others does not provide a full picture of the importance of Aboriginal rights in general and of a right of self-government in particular.

A claim of prior occupancy, i.e., that Aboriginal peoples lived on and occupied the North American continent before European contact, justifies some aspects of jurisdictional authority, but weakens as a justification for recognizing Aboriginal governmental power not directly connected to land use. A claim of prior sovereignty, i.e., that Aboriginal peoples exercised sovereign authority over territory and persons before European contact, is at the heart of Aboriginal self-government, but there is more to the claim than a retrospective glance at history. Treaties entered into by First Nations and the Crown speak to the fact that First Nations were regarded by the Crown as self-governing entities, but not all Aboriginal people are covered by treaty, and the language of some treaties is less than suggestive of Aboriginal jurisdictional authority. The right of self-determination, i.e., the right of a people to decide whether to be self-governing, is also at the heart of the right of self-government, but it is an unwieldy justification of continued Aboriginal participation in Canadian political institutions. The protection of minority culture, another justification often offered in support of Aboriginal self-

government, is surely one of the purposes of the right of self-government, but Aboriginal people in many ways are different from other racial or cultural minorities in Canada.

The right of Aboriginal self-government thus possesses complex normative dimensions. Supported by a number of distinct but intersecting normative justifications, the right of self-government is best defended by a combination of arguments, each supporting a different dimension of the nature of the right. Such a stance blunts critiques based on the contingency of normative thought by consciously refusing to ground the right of self-government in a single normative principle. The paper advances the view that the Royal Commission ought to consider a plurality of arguments housed in principles of equality when defending any recommendations it may propose on the subject.

NORMATIVE DIMENSIONS OF THE RIGHT OF ABORIGINAL SELF-GOVERNMENT

BY PATRICK MACKLEM

INTRODUCTION

In this paper I hope to provide some insight into "the philosophical bases upon which the right of self-government rests" in order to assist in determining whether it is "a right of peoples, of treaties, of indigeneity, of nationhood, of race and/or ethnicity, of occupation of land, and/or [of] politics."¹ Philosophical foundations of the right of Aboriginal self-government depend in no small measure on normative justification.² What are the normative justifications of the right of Aboriginal self-government? Why should Canadian citizens and Canadian institutions recognize a right of Aboriginal self-government? Canadians deserve answers to these questions, and, to this end, I outline, describe, analyze and assess five perspectives in support of the right of Aboriginal self-government: prior occupancy, prior sovereignty, treaties, self-determination, and preservation of minority culture. I argue that each perspective expresses unique truths about the nature of Aboriginal rights, and reliance on one perspective to the exclusion of others does not provide a full picture of the importance of Aboriginal rights in general and of a right of self-government in particular. I advance the view that the Commission ought to consider a plurality of arguments housed in principles of equality when defending any recommendations it may propose on the subject.

In addition to reviewing the strengths and weaknesses of several justifications of the right of Aboriginal self-government, I also address the extent to which such justifications are at variance with western liberal-democratic political values. That is, I hope to examine how "the

principles underlying the right of Aboriginal self-government relate to non-Aboriginal traditions of governance."³ Liberal-democratic political theory, generally speaking, is hostile to rights that attach to persons on the basis of racial or cultural difference. In this paper I outline ways in which at least some of the principles underlying an Aboriginal right of self-government are more compatible with liberal-democratic political theory than they may appear.

METHODOLOGY

Normative justifications of rights in general invariably make reference to legal sources, and normative justifications of a right of Aboriginal self-government are no different in this respect. Because law and morality are deeply intertwined in questions concerning the nature of rights, it is easy to slip into a mode of justification that has been described as legal positivism: namely, the view that rights are simply the product of positive legislative or judicial action.⁴ A right of Aboriginal self-government can be justified, for example, as an expression of a more general international right of self-determination,⁵ or by reference to section 35(1) of the *Constitution Act, 1982* and jurisprudence on "existing Aboriginal and treaty rights."⁶ A positivist justification of a right of Aboriginal self-government would simply point to international or domestic legal sources as support for its recognition and would not seek to provide philosophical or normative reasons why such a right ought to be recognized.

The drawbacks of positivism in this regard are threefold. First, positivist justifications of rights obscure, but do not eliminate, normative or philosophical concerns. In positivist justifications of rights, normative concerns invariably re-emerge, but are rarely addressed, in relation to the legal source invoked as the foundation of the right under scrutiny. If

an international right of self-determination is held up as a legal source of a right of Aboriginal self-government, for example, normative concerns surrounding the right of Aboriginal self-government tend to resurface in relation to the right of self-determination, e.g., why *should* peoples have a right of self-determination? Positivist justifications too often appear to be question-begging; law is justified by the fact that it is the law.

Second, positivist justifications of rights tend to assume a degree of determinacy in law that, on many occasions, does not exist.⁷ Legal indeterminacy in this context exists both in relation to the choice of governing legal norm and in relation to the legal norm chosen. With respect to the former, international law, for example, both underpins and undercuts a right of Aboriginal self-government. Article 27 of the *International Covenant on Civil and Political Rights* provides that "persons belonging to [ethnic] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture,"⁸ whereas the Universal Declaration of Human Rights recognizes equality before the law.⁹ A positivist assessment of a right of Aboriginal self-government will be influenced by whether one relies on Article 27 or the Universal Declaration, and the law itself offers little guidance in relation to the choice. Moreover, the legal norm chosen to guide the inquiry often turns out to be a highly abstract principle that logically could be used to support *and* criticize the specific proposition under scrutiny. Does an international right of self-determination, for example, attach to Canadians, or to Aboriginal people who live in Canada? Abstract legal norms often turn out to be contested sites of interpretation, and normative stances are necessary to render them useful in particular circumstances.

Third, positivist modes of reasoning often trap one into thinking that the right in question does not or should not exist if it cannot be

justified by reference to legal sources. For example, international law governing a right of self-determination has yet to embrace openly its application to Indigenous peoples.¹⁰ In light of international law's apparent reluctance to extend the right to Indigenous peoples, it is tempting to conclude that self-determination discourse is of secondary importance. Where there are few or no legal sources in support of recognizing a right, an undue emphasis on positivist modes of reasoning may terminate the inquiry prematurely. In such cases, positivism tends to have a conservative effect on inquiries into the foundation of rights and obfuscates the fact that the inquiry is not into whether the law recognizes, but instead whether the law ought to recognize, the right in question.

Nonetheless, law is deeply implicated in the formation and conceptualization of the right of Aboriginal self-government and contains a number of justifications in support of its recognition. Reference to legal sources is virtually unavoidable in assessing normative and philosophical perspectives on the right. This paper makes extensive reference to legal sources, although it attempts to avoid the pitfalls of positivism by not viewing legal support as either a necessary or a sufficient condition for the right's existence.

Having sown seeds of doubt on legal positivism, I must also express reservations at the outset about the ability of normative or philosophical thought to provide secure foundations for rights. In an age marked by "vigorous denunciation of abstract reason and a deep aversion to any project that [seeks] universal human emancipation through mobilization of the powers of...reason",¹¹ any attempt to explain, ground, secure, justify, rationalize or simply expound on the nature of rights immediately falls prey to the charge of contingency. Theories once thought to provide normative foundations that transcend

cultural difference are viewed increasingly as local, temporal, and embedded in convention and history.¹²

In the face of claims asserting the contingent ‘nature’ of post-modern life, it is tempting to see contingency itself as providing a justification of rights. Yet attempts to ground rights in contingency — as a means of protecting, for example, cultural difference — are not immune to critique. Cultural difference, as a foundation of a theory of rights, is as suspect a candidate for a basis of rights as any theory that alleges universal appeal, if only because its alleged beneficiary — culture itself — is not a monolithic object that can be preserved by imposing a legal grid of right and duty. Instead, culture is an active web of interlocking and intersecting allegiances that continually cut across and frustrate efforts at legal definition,¹³ as demonstrated by debates over gender and aboriginality in relation to the *Canadian Charter of Rights and Freedoms* and recent efforts at constitutional reform.¹⁴

Neither legal indeterminacy nor the contingency of modern life disarms normative justification. In fact, acceptance of indeterminacy and contingency can have a liberating effect on normative thought. What was once thought to be fixed and immutable is now open to challenge, transformation and reform. Nonetheless, normative justifications that take indeterminacy and contingency seriously are necessarily tentative and incomplete. Instead of attempting to provide ahistorical, acultural and universal foundations of rights, such justifications attempt instead to provide normative reasons that seek to persuade and convince people to recognize certain interests as more important than others and, in the case of an Aboriginal right of self-government, to recognize certain interests as worthy of the mantle of constitutional right.

What follows is an unabashedly tentative attempt to cast in normative terms several justifications of an Aboriginal right of self-government. Each justification makes a moral claim, by which I mean

that each provides a normative reason for recognizing a right of self-government. The nature of the appeal varies from justification to justification. Some rest on little more than an intuitive sense of fairness; others appeal to deeper and admittedly contested values such as equality and contractual freedom. What all of them share, I hope, is some degree of acceptance among Aboriginal and non-Aboriginal people. In the face of contingency, all we can aim for is some measure of common purpose.¹⁵

PRIOR OCCUPANCY

Perhaps the most common claim in relation to Aboriginal rights in general is that Aboriginal people ought to enjoy Aboriginal rights because they lived on and occupied portions of the North American continent before European contact. A claim of prior occupancy corresponds to a relatively straightforward conception of fairness that suggests that, all other things being equal, a prior occupant of land possesses a stronger claim to that land than subsequent arrivals.¹⁶ Prior occupancy arguments are commonly found in doctrinal justifications of Aboriginal rights with respect to land. The common law of Aboriginal title is heavily influenced by the fact that Aboriginal people occupied the continent from time immemorial.¹⁷ The common law recognizes that Aboriginal people enjoy common law usufructuary rights of use and enjoyment of land if they can demonstrate that they and their ancestors were members of an organized society that occupied the specific territory over which rights are asserted to the exclusion of other organized societies at the time sovereignty was asserted by England.¹⁸

Discourse surrounding Aboriginal rights has begun recently to shift from a focus on property entitlements toward an emphasis on rights of governance. Although prior occupancy is typically relied on as

a justification for recognizing Aboriginal title at common law, a claim of prior occupancy can be and has been stretched to justify not only differential property entitlements but also certain aspects of self-governance. Prior occupancy, in other words, can also be used to support arguments with respect to the right of Aboriginal self-government, at least in relation to decisions about land and resource use.¹⁹

One advantage to a claim of prior occupancy in this context is that it enjoys normative significance for non-Aboriginal and Aboriginal people alike. A claim of prior occupancy conforms to a relatively straightforward non-Aboriginal philosophical and legal conception of just holdings with respect to land, namely, all other things being equal, prior occupants of land have a stronger claim to use and enjoyment than newcomers.²⁰ Jean-Jacques Rousseau, for example, traced the origin of property to the "first claimant".²¹ Similarly, Sir William Blackstone, in his *Commentaries on the Laws of England*, wrote that "occupancy is the thing by which the title was in fact originally gained; every man seising to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else."²² More recently, the libertarian philosopher Robert Nozick has constructed an entire theory of justice based on property entitlements. In his view, state action that does not respect just acquisitions or transfers of property is itself unjust.²³

Claims of prior occupancy also have particular resonance and appeal to Aboriginal people, in so far as Aboriginal use and enjoyment of land is often spoken of by Aboriginal people as possessing a profound spiritual dimension. Aboriginal people often refer to a uniquely Aboriginal conception of land, where land is viewed not simply as a commodity but as something to which Aboriginal people are

spiritually connected. Testimony by Gitksan chiefs in 1884 provides a powerful illustration of Aboriginal conceptions of land:

We liken this district to an animal, and our village, which is situated in it, to its heart. Lorne Creek, which is almost at one end of it may be likened to one of the animal's feet. We know that an animal may live without one foot, or even without both feet; but we also know that every such loss renders him more helpless, and we have no wish to remain inactive until we are almost or quite inactive.²⁴

As stated succinctly by Chief James Gosnell in his testimony before the 1983 First Ministers' Conference on Aboriginal Constitutional Matters:

It has always been our belief...that when God created this whole world he gave pieces of land to all races of people throughout this world, the Chinese people, Germans and you name them, including Indians. So at one time our land was this whole continent right from the tip of South America to the North pole...

It has always been our belief that God gave us this land...and we say that no one can take our title away except He who gave it to us to begin with.²⁵

Similarly, Oren Lyons has stated:

What are aboriginal rights? They are the law of the Creator. That is why we are here; he put us in this land. He did not put the white people here; he put us here with our families, and by that I mean the bears, the deer, and the other animals. We are the aboriginal people and we have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility. Each generation must fulfil its responsibility under the law of the Creator. Our forefathers did their part, and now we have to do ours. Aboriginal rights means aboriginal responsibility, and we were put here to fulfil that responsibility.²⁶

Justifying the right of Aboriginal self-government by reference to the fact that Aboriginal people lived on and occupied portions of the

continent prior to European contact conforms closely to the subjective experiences of many Aboriginal people in relation to land.

A second advantage of grounding a right of Aboriginal self-government by reference to prior occupancy is that this mode of justification corresponds with the dominant legal framework surrounding the assertion of Aboriginal rights in Canada. Jurisprudence on section 35(1) of the *Constitution Act, 1982* provides that Aboriginal practices "integral" to the definition of an Aboriginal community that were not extinguished by law before 1982 can be asserted as constitutional rights.²⁷ It is not a far leap from protecting a right to fish, for example, as an incident of Aboriginal title, to protecting rights to decide where, when and by whom fishing can occur. The latter set of protected activities involves elements of jurisdiction over land and persons and can thus be described as incidents of a more general right of Aboriginal self-government. A claim of prior occupancy in support of the right of Aboriginal self-government, in other words, has the advantage of conforming closely to traditional legal modes of conceptualizing Aboriginal rights.

The strength of prior occupancy as a justification begins to weaken, however, once the right of self-government is asserted in contexts other than land use. Prior occupancy of land may justify recognizing some degree of jurisdictional control over how land is to be used and by whom — control that could be viewed as instances of a right of self-government. It is less clear why or how prior occupancy of land justifies, for example, Aboriginal authority to regulate assault against the person. A claim stronger than prior occupancy is needed to provide normative support for the differential treatment of persons based on indigenous difference entailed by the right of Aboriginal self-government. Supporting a general right of Aboriginal self-government by reference to claims of prior occupancy of land, although familiar to

now-traditional Canadian legal understandings of Aboriginal title, justifies only some types of Aboriginal jurisdictional authority.

PRIOR SOVEREIGNTY

A variation on the claim of prior occupancy is a claim of prior sovereignty. More specifically, Aboriginal people ought to be entitled to exercise jurisdiction over their lands and people because they exercised sovereign authority over their lands and people before European contact. In the words of Georges Erasmus and Joe Sanders, "[i]t is a matter of historical record that before the arrival of Europeans,...First Nations possessed and exercised absolute sovereignty over what is now called the North American continent."²⁸ A prior sovereignty claim posits that inherent Aboriginal sovereignty should not be viewed as surrendered or extinguished by the establishment of western-style nation-states or by treaty with the Crown. Instead, pre-existing Aboriginal sovereignty ought to be recognized in the form of an Aboriginal right of self-government within the Canadian federation. In this context, a right of self-government recognizes a compromise of sorts between an idealistic desire to turn back the clock to preserve complete Aboriginal sovereignty in the face of the Canadian state, and a resigned acceptance of Aboriginal assimilation. Recognition of a right of self-government would restore at least some of the sovereign authority Aboriginal people enjoyed prior to contact. It would provide Aboriginal nations with a measure of jurisdictional authority over matters central to their indigenous difference, while at the same time permit Aboriginal people to participate and be represented in Canadian political institutions.

The normative force behind a claim of prior sovereignty lies in its implicit criticism of the justice of British and French assertions of sovereignty over Aboriginal peoples. International legal principles

governing claims of sovereignty at the time of European contact recognized assertions of sovereignty in the event of conquest and, in the context of Indigenous peoples, settlement. Criticizing the justice of legal principles of conquest in this context involves claims that Indian nations were not conquered, that they should not have been conquered, or that conquest should not result in the eradication of pre-existing Aboriginal sovereignty. Criticizing the justice of principles of settlement involves claims that settlement of North America, in itself, should not permit the eradication of prior Aboriginal sovereignty. While British sovereignty perhaps ought to follow and govern settlers of the continent, there is no acceptable reason why it ought to have applied to Aboriginal nations as well, to the exclusion of Aboriginal forms of government.

There are legal reasons why international law permitted the assertion of British and French sovereignty over Aboriginal people and seemingly authorized the denial of a right of Aboriginal self-government. However, those legal reasons can and ought to be subjected to normative scrutiny. As is well known, international law at the time of European contact, according to the doctrine of discovery, viewed Aboriginal nations as inferior to European nations and therefore did not recognize the fact of Aboriginal sovereignty in North America. As a result, mere settlement, as opposed to conquest or treaty, was sufficient to assert sovereignty over Aboriginal people on the continent.²⁹ As is also well known, the justification offered by international law in support of this conclusion rested on racist premises; as a result it is normatively unacceptable by Aboriginal and non-Aboriginal standards alike as a reason to deny Aboriginal people a right of self-government.

One advantage of grounding the right of Aboriginal self-government in the fact of prior indigenous sovereignty is that an analogy can be drawn with Quebec. After the conquest of the French, Quebec's laws and institutions, indeed the right to self-government,

continued in force until they were expressly overruled by the British Parliament. Recognition of prior sovereignty informed British, and continues to inform Canadian, treatment of the French population. It is true that British sovereignty over Quebec was acquired by conquest, whereas British and French sovereignty over Aboriginal people, in the eyes of international law, was acquired by the mere fact of settlement. However, one would have thought that the case for the recognition of prior sovereignty is normatively *more* compelling in the event of settlement than it is in the event of conquest. Nonetheless, even accounting for some difference in principle between conquest and settlement, British and Canadian treatment of Quebec is an indication that continued recognition of the prior sovereignty of a colony or nation is not foreign to basic political principles of the Canadian state.

There are several drawbacks to emphasizing prior sovereignty in a normative defence of the right of Aboriginal self-government. Although the assertion of European sovereignty over Indigenous peoples was clearly based on racist assumptions about indigenous difference, can it be said that the assertion of Canadian sovereignty over Aboriginal people today is based on racist principles? That is, the assertion of sovereignty by one nation over another nation is not *per se* normatively illegitimate; its legitimacy depends on the reasons that can be offered in its defence. One reason will no doubt be the actual historical reason for the initial assertion of sovereignty; however, other reasons, unrelated to the historical justification, may emerge over time independently to support the assertion of sovereignty. Demonstrating the moral bankruptcy of the historical justification may not end the inquiry.

For example, it may be that, regardless of the historical reasons behind its existence, there are pragmatic reasons to continue to respect Canadian sovereign authority over Aboriginal people. Chief Justice John Marshall of the United States Supreme Court, speaking of the doctrine

of discovery, stated that "if the principle has been asserted in the first instance, and afterward sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."³⁰ An argument that looks backward in time to right past wrongs tends to lose normative force over time. Valid non-Aboriginal and Aboriginal interests arising subsequent to the assertion of sovereignty over Aboriginal people may deserve protection in the form of continued respect for Canadian sovereignty and attendant legislation, despite the fact that initial justifications of the assertion of sovereignty itself are suspect.

A similar pragmatic stance marks international law's reluctance to second-guess the legitimacy of state borders. In the words of James Anaya, there exists

a normative trend within international legal process toward *stability through pragmatism* over instability, even at the expense of traditional principle. Sociologists estimate that today there are around 5,000 discrete ethnic or national groupings in the world, and each of these groups is defined — and defines itself — in significant part by reference to history. This figure dwarfs the number of the independent states in the world today, approximately 176. Further, of the numerous stateless cultural groupings that have been deprived of something like sovereignty at some point in their history, many have likewise deprived other groups of autonomy at some point in time. If international law were to fully embrace ethnic autonomy claims on the basis of the historical sovereignty approach, the number of potential challenges to existing state boundaries, along with the likely uncertainties of having to assess competing sovereignty claims over time, could bring the international system into a condition of legal flux and make international law an agent of instability rather than stability.³¹

This objection can be met with the rejoinder that recognition of a right of Aboriginal self-government need not constitute a wholesale rejection of Canadian sovereignty over Aboriginal people. Recognition

of a right of Aboriginal self-government is driven by a desire to recognize inherent Aboriginal sovereignty *in light of* the existence of the Canadian state. Interests that have arisen in light of the establishment of Canadian laws and institutions are not automatically threatened by recognition of a right of Aboriginal self-government. Whether such interests ought to be threatened will depend on the scope of the right, which in turn will likely be defined by an open (and indeed pragmatic) assessment of all the relevant interests at stake.

Another disadvantage of relying on a claim of prior sovereignty, however, is that it seems incomplete. That is, the fact that European assertions of sovereignty were based on racist justifications is not the only reason why Canada ought to recognize a right of Aboriginal self-government. A claim of prior sovereignty tends to dilute other purposes furthered by a right of Aboriginal self-government. Such purposes include the protection of Aboriginal difference and the amelioration of Aboriginal disadvantage. It is clear that any normative defence of a right of Aboriginal self-government is likely and ought to make reference to prior Aboriginal sovereignty. However, the right of Aboriginal self-government means more than the partial restoration of prior Aboriginal sovereignty, and a complete normative defence of the right ought to reflect this fact.

TREATIES

Treaties between the Crown or colonial authorities and Aboriginal nations are often offered as justification for recognizing a right of self-government on behalf of Aboriginal peoples. Aboriginal peoples signalled early on that they were distinct and autonomous by collectively negotiating the terms on which non-Aboriginal settlement and development could occur on the continent. In the words of Francis

Bruno, an Aboriginal elder, commenting on Treaty 8, "what I do understand is that we were to share the land with other people who were the white people. That was the purpose of the treaty, I think, since there were going to be more white people, to share the land with them."³² A treaty-based perspective in favour of the right of Aboriginal self-government argues that the relationship between Aboriginal nations and Canada ought to be modelled after the treaty-making process, which recognized rights of self-government on behalf of Aboriginal people and a relationship of equality and mutual respect between Aboriginal nations and the Crown.

One advocate of this perspective is Robert Clinton, who argues that Aboriginal nations located in the United States are entitled to claim certain collective rights of groups by virtue of treaty promises made by the United States government to provide political autonomy.³³ In part, Clinton is attempting to show that rights that attach to Indian nations, "while initially appearing foreign to Anglo-American jurisprudence, may share more in common with existing western...legal doctrines than first suspected."³⁴ He writes the following:

Indian tribes and other indigenous peoples also have legitimate claims to group rights. In the United States, for example, the tribes of the southeastern states ceded large portions of their land in exchange for explicit treaty promises. These treaties, made under the solemn authority of the United States, promised that the tribes would remove to an area outside of state or federal governance and once there exclusively govern themselves under their laws, rather than being governed by any state or federal territory....Similarly, most tribes agreed to cede lands, end hostilities, or otherwise remove to those Indian islands that we call Indian reservations based on explicit or implicit guarantees that these islands would provide *group* sanctuary. These agreements envisioned that tribal reservations would allow the tribes to continue some of their culture, their way of life, and their political autonomy, without influence from the dominant colonial society which rapidly was encroaching on and eroding important components of that culture.... All of these rights

involved demands for the Indians' rights of group autonomy, not individual freedoms. Indeed, the treaties were negotiated with the tribes, as separate domestic dependent nations, not with individuals.³⁵

Clinton points to a treaty between the United States and the Cherokee nation as an illustration of his claims:

The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them....³⁶

Reflected in the terms of this treaty is a powerful claim of self-government, perhaps best articulated by the Cherokee nation's appeal to Congress in 1830 that the Cherokee people be allowed to remain on their ancestral homelands:

We wish to remain on the lands of our fathers. We have a perfect and original right to remain without interruption or molestation. The treaties with us, and the laws of the United States made in pursuance of treaties, guaranty our residence and privileges, and secure us against intruders. Our only request is, that these treaties may be fulfilled, and these laws executed.³⁷

John Danley combines a focus on prior occupancy with a treaty-based argument in favour of Aboriginal autonomy. He writes that, unlike Aboriginal people, "who were here first and...may count as a people with whom treaties have been signed", individuals who immigrated recently to the United States

cannot appeal to doctrinal nationalism because they have voluntarily consented to become part of the political community of the United States. They negotiated not as groups but as individuals with the government of the United States. No treaties were signed or ought to have been signed with their representatives.³⁸

Aboriginal nations are entitled to their own distinctive forms of government because, unlike other groups whose members consented to American political values, Indigenous people were here first, and they negotiated their political relationship with the non-indigenous government on a collective, as opposed to an individual, basis.

Perhaps the most well known advocates of a treaty-based approach to the relationship between Aboriginal nations and settler states are Russell Lawrence Barsh and James Youngblood Henderson, who argue that traditional American jurisprudence on the inherent right of self-government assumes erroneously that Aboriginal nations were conquered by the United States and, as a result, they are entitled to govern themselves according to their own laws only until Congress passes a law to the contrary.³⁹ Barsh and Henderson argue that common law principles governing conquest have skewed understandings of treaties, so that they are wrongly viewed as documents that outline the consequences of conquest and that can be overridden by Congress if circumstances so require. In their view, the application of the law of conquest to Aboriginal nations "has no historical foundation".⁴⁰ Aboriginal nations should not be viewed as simply entitled to govern themselves until Congress decides the contrary. Treaties ought to be viewed instead as a source of *federal* power, as spelling out the terms on which federal power can be exercised in the United States: that "Treaties are a form of political recognition and a measure of the consensual distribution of powers between tribes and the United States."⁴¹ Like the compact among American states that created the federal government, treaties reserve to the tribe those powers not expressly delegated to Congress.

The normative significance of the process of treaty making lies in principles of consent, and the process suggests mutual recognition of the respective political authority of the parties.⁴² Moreover, several

contemporary land claims agreements in Canada with the Crees and other nations have made provision for some measure of Indian government and could serve to ground an Aboriginal right of self-government.⁴³ However, a treaty-based defence suffers from several weaknesses. First, a treaty-based defence of an Aboriginal right of self-government is only as powerful as the treaty language upon which it rests. The language in the treaty negotiated by the Cherokee nation cited by Clinton is extremely supportive of rights of self-governance, shielding the Cherokee nation from state law and authorizing the promulgation of Cherokee law. However, many Aboriginal nations in Canada negotiated treaties with the Crown that stripped their people of any special rights to land and forced their relocation to unproductive parcels of land. In such cases, additional argument on how to interpret apparently restrictive treaty language as providing for rights of self-government would be necessary in order to extend a treaty-based right of self-government to those nations under the legacy of truncated treaty rights. Other treaties in Canada, especially those negotiated early in the history of British settlement, do provide for a continuation of Aboriginal autonomy and could serve as foundations for rights of self-government.⁴⁴ However, if rights of self-government are based exclusively on treaty language, the nature and scope of such a right would vary dramatically from Aboriginal nation to Aboriginal nation. It would result in checkerboard justice, with the nature and scope of Aboriginal autonomy dependent on the extent of bargaining power enjoyed by one's ancestors at a particular moment in the distant past.

Second, many Aboriginal nations have not entered into any form of treaty with Canadian or Crown authorities. The Wet'suwet'en people of interior British Columbia, for example, are not party to any treaty with either the provincial or the federal Crown. If the right of self-government is based on the treaty-making process, what type of right

can the Wet'suwet'en claim? If they also enjoy a right of self-government, then the source of the right cannot be the treaty-making process. A treaty-based justification of an Aboriginal right of self-government, to be applicable to all Aboriginal nations in the country, must be supplemented with other justifications.

Third, the logic of a treaty-based justification drives one to conclude that absent the existence of a treaty, Canada enjoys no sovereign authority over Aboriginal people at all. While this position is certainly defensible, assuming that one concludes that principles of conquest and settlement justifying assertions of sovereignty are themselves unjust,⁴⁵ it leaves one in the precarious position of arguing for complete Aboriginal independence, which then denies Aboriginal people the right to enjoy benefits associated with Canadian citizenship in addition to rights of self-governance. A treaty-based justification of a right of self-government, when applied to Aboriginal people not party to a treaty, does not provide for a comprehensible defence of their participation in Canadian governmental institutions or of their right to govern themselves.

What is useful and important to retain from scholarship that emphasizes the importance of the treaty process is not so much that treaties are the source of an Aboriginal right of self-government. Treaties may or may not serve as a foundation of a right of self-government for Aboriginal people. As stated above, this will depend on the language of the particular treaty and on whether the Aboriginal nation has entered into a treaty with the Crown. Instead, the importance of treaties and the treaty-making process lies in the fact that the process of negotiating treaties serves as evidence that the Crown historically treated Aboriginal nations as sufficiently autonomous to warrant treaties. Moreover, the process suggests that the Crown viewed treaties as necessary or desirable agreements to obtain before subjecting Aboriginal

people to foreign law. In other words, the treaty-making process is evidentiary support of the fact that Aboriginal nations were (and were regarded by the Crown as) self-governing communities and entitled to govern themselves until they suggest an intent to the contrary. The treaty-making process signals that Aboriginal nations enjoy a right of self-government and that the Crown has long recognized this fact.

SELF-DETERMINATION

Another normative argument in favour of a right of Aboriginal self-government is one that focuses on the right of a people or a nation to self-determination. International legal principles concerning a right of self-determination are often invoked in support of the normative proposition that all peoples, or nations, ought to be able to determine their own political future or destiny free of external interference.⁴⁶ The right of self-determination, in the words of James Anaya, has arisen "within international law's expanding lexicon of human rights concerns and accordingly is posited as a fundamental right that attaches collectively to groups of living human beings."⁴⁷ In this light, the right of Aboriginal self-government can be portrayed as a domestic, constitutional expression of the normative ideal of self-determination.

International legal sources supporting a right of self-determination include Article 1(2) of the United Nations Charter, which lists the principle of self-determination as one of the purposes of the United Nations.⁴⁸ Article 55 of the Charter calls for the promotion of a number of social and economic goals, "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."⁴⁹ Similarly, the International Covenant on Civil and Political Rights provides that "[a]ll

peoples have the right of self-determination....[and to] freely determine their political status and freely pursue their economic, social and cultural development."⁵⁰ Self-determination has also been described as a right by the International Court of Justice.⁵¹

Initially, the principle of self-determination was invoked primarily in the international sphere as a justification for the liberation of nations in Eastern Europe under the yoke of foreign domination in the early twentieth century.⁵² It then served increasingly as a clarion call for colonies seeking to shed imperial shackles and assume independent statehood status. In the 1950s, Belgium attempted to extend the principle of self-determination not only to colonies that wished to rid themselves of their imperial masters, but also to populations within independent states, so that indigenous populations and cultural minorities could assert a right of self-determination under international law.⁵³ The Belgian initiative was unsuccessful; in passing the *Declaration on the Granting of Independence to Colonial Territories*,⁵⁴ the General Assembly of the United Nations decided expressly to restrict the application of the principle of self-determination to peoples who lived on territories geographically separate from their political masters. The Declaration stated that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations."⁵⁵ In the words of Patrick Thornberry,

The effect is that colonial boundaries function as the boundaries of the emerging States. Minorities, therefore, may not secede from States, at least, international law gives them no *right* to do so. The logic of the resolution is relatively simple: peoples hold the right of self-determination; a people is the whole people of a territory; a people exercises its right through the achievement of independence.⁵⁶

Little has changed since the passage of the Declaration: international law has yet to extend the right of self-determination to Indigenous peoples who live within the confines of a nation-state.

Current limitations of the principle of self-determination under international law should not obscure its normative dimensions⁵⁷ or the possibility that international law will begin to accommodate indigenous demands under the rubric of self-determination.⁵⁸ Certainly, indigenous organizations themselves describe their objectives in terms of self-determination. The World Council of Indigenous Peoples, at its second general assembly, described self-determination as one of the "irrevocable and inborn rights which are due to us in our capacity as Aborigines."⁵⁹ The International Indian Treaty Council described indigenous populations as "composed of nations and peoples, which are collective entities entitled to and requiring self-determination", which in turn is described as including external and internal features.⁶⁰ External self-determination presumably involves all the features of independent statehood, whereas internal self-determination includes rights to maintain and promote indigenous cultural difference through independent political institutions.⁶¹

One promising development on the international law front is the *Draft Declaration on the Rights of Indigenous Peoples*, prepared by a sub-commission of the UN Commission on Human Rights, which proposes to recognize that "Indigenous peoples have the right to self-determination in accordance with international law, subject to the same criteria and limitations as applied to other peoples in accordance with the Charter of the United Nations."⁶² Accordingly, the Draft Declaration proposes to recognize *inter alia* indigenous rights of autonomy and self-government, the right to manifest, practise and teach spiritual and religious traditions, rights to territory, education, language and cultural property, and the right to maintain and develop indigenous

economic and social systems.⁶³ An explanatory note accompanying the Draft Declaration draws the aforementioned distinction between 'external' and 'internal' self-determination. An indigenous right of external self-determination is contingent upon the failure of the state in which Indigenous peoples are located to accommodate indigenous aspirations for internal self-determination:

Once an independent State has been established and recognized, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new States. This requirement continues unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be "representing the whole people." At that point, and if all international and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified in creating a new State.⁶⁴

Acceptance by the world community of the Draft Declaration would usher in a new international legal order, wherein Indigenous peoples would not longer be denied the right of self-determination simply because of their indigeneity.

Despite the current lack of international legal recognition, the principle of self-determination can stand as a normative foundation of the right of Aboriginal self-government. The right of Aboriginal self-government could easily be conceptualized as a domestic, constitutional expression of the right of Aboriginal peoples to self-determination. For self-determination to serve as a stable foundation of the right of self-government, its normative value or importance would have to be articulated clearly. Avishai Margalit and Joseph Raz argue that there are two possible normative approaches to the right of self-determination: one that emphasizes the intrinsic value of self-government, and another that emphasizes self-government's instrumental value.⁶⁵ Each is sketched out below.

An argument in favour of the right of self-determination based on the intrinsic value of self-government emphasizes the fact that cultural and national membership is an important aspect of individual identity and thus deserves full expression in community life. Full expression of cultural and national membership includes rights of political participation, because political participation is an essential component of community life. Self-government, "the value of entrusting the general political power over a group and its members to the group", is thus an intrinsically valuable component of political participation.⁶⁶ Members of the group thus ought to enjoy a right to determine whether to be self-governing, i.e., a right of self-determination.⁶⁷

Margalit and Raz argue that viewing self-government as intrinsically valuable wrongly assumes that political participation must occur "in a framework exclusive to one's group or dominated by it".⁶⁸ They acknowledge that "peaceful and equitable sharing of the political arena" by different communities or nations may be impossible in light of historical hostilities, prejudice, or other factors, but they argue that there is nothing inherent in the value of political participation that requires separate political institutions.⁶⁹ Instead, self-government is instrumentally valuable to realize group identity. Sometimes it is a necessary instrument; other times it is not necessary at all. Whether it is in fact necessary will depend on a host of historically and politically contingent factors specific to the group in question and its relation to the broader political community in which it is located.

Viewing self-government instrumentally does not mean that the right to determine whether to be self-governing, the right of self-determination, attaches only in circumstances where self-government is necessary to realize group identity. According to Margalit and Raz, a group possesses a right of self-determination even where a case for self-government does not exist, i.e., where a group can realize its identity in

political institutions not limited to the group itself. A group has the right to be wrong about the necessity of self-government. However, the right of self-determination must be exercised only for the right reason, i.e., to secure conditions necessary for the realization of group identity.

Moreover, it extends only to groups likely to respect the basic rights of all inhabitants of the territory, and its exercise must be accompanied by measures designed to prevent fundamental endangerment of interests of inhabitants of other countries.

One advantage to a defence of the right of Aboriginal self-government based on self-determination is that the principle of self-determination, as described by Margalit and Raz, speaks directly to, and attempts to protect, the profound influence of community on individual identity. Qualified groups ought to be free to determine their collective political future, and if a particular group is of the view that separate political institutions are necessary to protect communal difference, it ought to be free to design institutional arrangements that attempt to secure such a result. Viewing the right of Aboriginal self-government in these terms involves a recognition that Aboriginal forms of government are necessary to secure conditions required for the expression of group identity. This in turn involves an implicit acknowledgement that Canadian political institutions have failed and will continue to fail Aboriginal people in this regard, despite any possible future reforms that seek to ensure greater Aboriginal inclusion.

However, an instrumental conception of the value of self-government does not capture the full dimensions of the right of Aboriginal self-government. Aboriginal self-government is not premised on the failure of Canadian political and legal institutions to accommodate Aboriginal difference; its sources are independent of the machinations of the Canadian state, rooted, at least in part, in the fact of prior indigenous sovereignty. Aboriginal people were self-governing

before European contact; at that time, self-government's value was intrinsic or inherent, not simply instrumental, to individual and collective Aboriginal identity. An instrumental theory of the right must provide convincing reasons why extraneous factors, such as the establishment of the Canadian state, transformed self-government into an instrumental value.

This requires an assessment of the justice of the assertion of European sovereignty over Aboriginal people. Viewing the assertion of European sovereignty as just enables one to construct the value of self-government as instrumental, i.e., as premised on the failure of Canadian political and legal institutions to secure conditions necessary for the protection of Aboriginal identity. However, as discussed in the previous section, the justice of European assertions of sovereignty is far from certain.⁷⁰ One could make pragmatic arguments in favour of accepting Canadian sovereignty over Aboriginal people (presumably to the extent that it provides conditions necessary for the protection of Aboriginal difference), but it is not clear why pragmatism ought to dictate whether self-government is of intrinsic or instrumental value to Aboriginal people. If Canadian political institutions cannot secure conditions necessary for the protection of Aboriginal difference, then this is all the more reason to recognize Aboriginal forms of government. However, rights of self-governance should not be seen as premised solely on the relative capacity of the Canadian state to accommodate Aboriginal difference, unless further argument is provided on the normative legitimacy of Canadian sovereignty over Aboriginal people itself.

Nonetheless, one can adopt an intrinsic theory of the value of Aboriginal self-government and argue that Aboriginal people ought to possess the right of self-determination, i.e., the right to determine whether to be self-governing. The collective right of Aboriginal people to determine whether to be self-governing is surely at the core of a right

of Aboriginal self-government. Defining this 'core' as a right of self-determination will likely widen the scope of the right of self-government, in that it would inevitably be interpreted through the prism of international legal discourse on self-determination. It would suggest support for the view that international law ought to recognize a right of Indigenous peoples who live within the confines of particular nation-states, under certain circumstances at least, to claim independent statehood, a position that has yet to be adopted in international law.⁷¹

Grounding the right of Aboriginal self-government in an intrinsic theory of the right of self-determination would thus carry weighty international repercussions. Whether such repercussions are desirable is beyond the scope of this paper. However, this discussion points to one drawback of relying on the principle of self-determination in support of the right of Aboriginal self-government. The discourse of self-determination is cumbersome in the context of a reform agenda that seeks to justify and provide Aboriginal political institutions that would operate alongside Canadian institutions. That is, self-determination discourse is difficult to adapt to the objective of allowing Aboriginal people to participate in their own, as well as Canadian, forms of government. The principle of self-determination, from a normative if not a legal perspective, justifies the recognition of Aboriginal governmental authority, but it is not clear why, having exercised rights of self-determination, Aboriginal people also ought to possess the right to continue to enjoy benefits associated with Canadian citizenship. The principle of self-determination, i.e., the right of a group to decide to be self-governing, does not appear to confer as well on the group in question a right to decide unilaterally the extent to which it is entitled to participate in the polity from which it seeks a measure of distance. If a group exercises its right to exclude others from its political institutions, on what basis can it demand representation in the political institutions of

those it has excluded? There may well be normative reasons in support of continued representation, but the principle of self-determination, standing alone, does not appear to provide them.⁷²

PRESERVATION OF MINORITY CULTURE

Aboriginal rights in general and a right of self-government in particular have also been defended as a means of protecting Aboriginal cultural differences from assimilative tendencies of more dominant cultures. The right of Aboriginal self-government can be seen as a collective right exercisable within the confines of the Canadian political system. In this light, Aboriginal rights can be viewed as part of broader national and international efforts to preserve not only the cultural integrity of Aboriginal people, but also the cultural integrity of other peoples otherwise threatened by dominant assimilative forces in modern nation-states.

Protection of minority cultures is not alien to Canadian constitutional traditions. In addition to the protection that Canadian law currently provides to Aboriginal peoples, there are several constitutional provisions that express respect for cultural difference. The federal structure of Canadian government was designed in part "to minimize ethnic competition between French and English by separating the united province of Canada into two provinces, Quebec and Ontario, to be dominated by French and English majorities respectively."⁷³ Section 133 of the *Constitution Act, 1867* provides for minority language protection in federal and Quebec political institutions.⁷⁴ Section 93 of the *Constitution Act, 1867* provides certain safeguards in the area of religious education.⁷⁵ The *Canadian Charter of Rights and Freedoms* expresses commitment to the preservation of minority culture, including provisions for minority language educational rights and an interpretive

clause that emphasizes "the preservation and enhancement of the multicultural heritage of Canadians".⁷⁶ Recognition of Aboriginal rights, including a right of self-government, conforms to a Canadian constitutional tradition of acknowledging and accommodating cultural difference.

Moreover, several international legal norms support claims of cultural integrity of minorities within nation-states. Numerous articles of the United Nations Charter, for example, affirm cultural co-operation and cultural development.⁷⁷ Article 27 of the *International Covenant on Civil and Political Rights* recognizes rights of members of "ethnic, religious or linguistic minorities...to enjoy their own culture, to profess and practise their own religion [and] to use their own language." The UN *Convention Against Genocide* provides added support for the concept of cultural autonomy,⁷⁸ as does the UNESCO *Declaration of Cultural Co-operation*, which affirms a right and duty of all peoples to protect and develop minority cultures throughout the world.⁷⁹ The UN *Convention on Racial Discrimination* calls for positive governmental action to "ensure the adequate development and protection of certain racial groups or individuals belonging to them."⁸⁰

There are several international documents that refer specifically to indigenous populations when speaking of the need to protect minority cultures within nation-states. For example, Convention 107 of the International Labour Organization,⁸¹ adopted in 1957, while advocating the "integration" of indigenous populations into national communities, also calls upon governments to develop co-ordinated and systematic action to protect indigenous populations and to promote their social, economic and cultural development.⁸² While the ILO Convention may now appear somewhat dated in its emphasis on integration,⁸³ its

existence suggests some degree of support at the level of international customary law for a right of Aboriginal self-government.

The International Labour Organization recently circulated a proposed revision of Convention 107, entitled a *Proposed Convention Concerning Indigenous and Tribal Peoples in Independent Countries*.⁸⁴ While conspicuously avoiding reference to the principle of self-determination,⁸⁵ it nonetheless recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the frameworks of the States in which they live."⁸⁶ It then lists an impressive range of rights that attach to Aboriginal people and responsibilities that attach to governments in relation to Aboriginal people that would facilitate the protection of Aboriginal ways of life.

Both the UN Draft Declaration and the ILO Convention provide rich sources of content for the right of Aboriginal self-government. Standing alone, however, they illustrate more than justify the right of Aboriginal self-government. If ratified, the draft Declaration and the Convention would simply form part of customary international law and would obtain normative legitimacy from the fact that the documents provide an indication of what a majority of states view as appropriate domestic treatment of Indigenous peoples. The utility of international legal principles in this context should not be discounted.⁸⁷ However, it should be emphasized that, unless one sides with the positivist view that a law obtains legitimacy by its very enactment,⁸⁸ the possibility of an *International Declaration on the Rights of Indigenous Peoples* or the existence of a *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* will not end normative inquiry. While the right of Aboriginal self-government can be characterized as the domestic

expression of international rights of Indigenous peoples, questions surrounding normative justifications of the right of Aboriginal self-government are simply deflected to the international sphere: why should Indigenous peoples possess special collective rights of cultural preservation?

Several authors have offered detailed arguments as to why preservation of cultural difference is normatively desirable within a modern democratic state. Will Kymlicka is perhaps the leading proponent of such a view. Kymlicka argues that cultural membership in some cases may justify unequal distributions of political rights and responsibilities within a political community otherwise committed to equality of individuals.⁸⁹ In his view, equality of individuals does not demand equality of result and an equal weighting of the interests and preferences of everyone. An individual ought to bear the costs of those choices she makes to give meaning and purpose to her life. However, an individual makes choices from a cultural backdrop of available options, and, in Kymlicka's view, one's cultural history is not a matter of choice but rather a function of circumstance. An individual should not be responsible for the costs associated with coming from one cultural background as opposed to another cultural background. Such differences are, in the language of John Rawls, morally arbitrary.⁹⁰

Unequal distributions of political rights and responsibilities to Aboriginal people can be defended, according to Kymlicka, "as a response, not to shared choices, but to unequal circumstances."⁹¹ Those unequal circumstances include differences in cultural background and the fact that, unlike non-Indigenous people, Aboriginal people must expend enormous resources simply trying to protect their cultural history and heritage from encroachment by majority cultures. Aboriginal rights are a means by which Indigenous people can be spared the cost of trying to keep their culture alive. Aboriginal rights are therefore a

means by which Indigenous people can be placed on an equal footing with non-Indigenous people by relieving Indigenous people of the costs associated with maintaining a responsibility that, although valuable and necessary, is not of their own making or choice.

One weakness associated with invoking the value of minority cultural protection in relation to the right of Aboriginal self-government is that this strategy runs the risk of reducing Aboriginal claims to those of minority claims. In the forceful words of the International Indian Treaty Council, "[t]he ultimate goal of their colonizers would be achieved by referring to indigenous people as minorities."⁹² Grounding the right of self-government in international principles respecting rights of minorities would ignore important historical and contemporary differences between Aboriginal people and other cultural minorities in Canada, namely, that Aboriginal people lived on, occupied, and exercised sovereign authority over, the North American continent before European contact.

On the other hand, it cannot be denied that existing international principles addressing cultural minorities are extremely useful tools for the protection of Aboriginal people. The risk associated with viewing Aboriginal peoples in Canada as constituting 'minorities' deserving of minority rights protection can be lessened significantly by tailoring the definition of 'minority' so that it does not assume away important differences between the Aboriginal population and other minority populations in the country.⁹³ More fundamental than whether the label 'minority' ought to attach to Aboriginal peoples is the question of what rights Aboriginal people will be entitled to exercise if the right of Aboriginal self-government is viewed as a right of a minority. If the rights that attach to Aboriginal people are those catalogued in the ILO Convention, for example, then important differences between Aboriginal peoples and other cultural minorities presumably will be acknowledged,

despite the minority description. Invoking of the label of 'minority' should not necessarily mean that Aboriginal people are entitled only to rights and liberties accorded to other minority cultures, but that Aboriginal people are entitled to at least those rights that attach to other cultural minorities. Whether Aboriginal people ought to be entitled to further legal protection by virtue of their indigeneity is a separate question.

Another drawback of viewing a right of Aboriginal self-government as a collective minority right is that it does not do justice to the nature of Aboriginal claims. The right of self-government involves more than freedom to engage in cultural practices otherwise threatened by assimilative tendencies; it includes the freedom to exercise a measure of governmental authority over lands and peoples. While the discourse of collective rights can be stretched to accommodate jurisdictional concerns, the right of Aboriginal self-government requires a certain amount of political and constitutional restructuring of Canadian governmental institutions. Properly understood, a right of Aboriginal self-government does not take the Canadian state as a given; while it does not demand separate Aboriginal statehood, it also challenges the distribution of legislative authority between Parliament and provincial legislatures as well as current administrative structures of justice. The discourse of collective cultural rights of minorities does not capture fully the constitutional, institutional and jurisdictional dimensions of the right. Nonetheless, it is true that part of the purpose of a right of Aboriginal self-government is to enable Aboriginal communities to exercise greater control over their distinct collective identities, and to this extent, a right of self-government is a collective right of Aboriginal peoples to preserve their distinctive cultures. However, the right involves more than the preservation of Aboriginal cultures, and a normative justification ought to acknowledge this fact.

TOWARD A NORMATIVE SYNTHESIS

Perhaps what all the normative justifications of a right of Aboriginal self-government just discussed share is a measure of incompleteness. Prior occupancy arguments justify some aspects of jurisdictional authority, but they weaken in relation to Aboriginal governmental power not directly connected to land use. Claims of prior sovereignty are at the heart of Aboriginal self-government, but there is more to the claim than a retrospective glance at history. Treaties entered into by First Nations and the Crown speak to the fact that First Nations were regarded by the Crown as self-governing entities, but not all Aboriginal people are covered by treaty, and the language of some treaties is less than suggestive of Aboriginal jurisdictional authority. The right of self-determination, i.e., the right of a people to decide whether to be self-governing, is also at the heart of the right of self-government, but it is an unwieldy justification of continued Aboriginal participation in Canadian political institutions. And the protection of minority culture is surely one of the purposes of the right of self-government, but Aboriginal people are different in many ways from other racial or cultural minorities in Canada.

One means of unifying these claims is to begin with the value of self-government, which infuses claims of self-determination and preservation of cultural difference with normative significance, and then assess claims of self-government by reference to principles of equality.⁹⁴ Above all, it is the fundamental value that people attach to self-government that renders self-government worthy of the status of a right. Self-government is valuable because it permits the political expression of individual and collective identities. Participation in Aboriginal forms of government is essential to individual and collective Aboriginal identities. At the core of the right of Aboriginal self-

government is self-government's value, as well as a right to determine whether in fact to be self-governing.

Given an apparent desire on the part of most Aboriginal people to couple self-government with continued Canadian citizenship status, however, mere emphasis on the value of self-government and a right of self-determination is insufficient justification of rights of self-governance. Normatively, if not legally, all peoples possess a right of self-determination, regardless of the vagaries of colonial boundaries. Yet a normative justification of rights of self-governance that fall short of independent statehood must refer to more than the value of self-government and the right of self-determination. The broader political community presumably is entitled to refuse continued association with the minority in question and to demand that the right of self-determination be exercised in its entirety.

It is at this point where reference to principles of equality bolster the normative force of Aboriginal claims of a right of self-government. Equality principles are doubly useful in that they possess normative significance to Aboriginal and non-Aboriginal people alike. The normative impulse behind claims of equality is a powerful claim of justice, namely, that equals ought to be treated equally and unequals unequally.⁹⁵ In determining whether and the extent to which the value of self-government ought to be recognized in the form of a right short of independent statehood, potential beneficiaries of self-government ought to be treated as formally equal to other potential claimants unless there is a good, i.e., normatively justifiable, reason to the contrary.

Before European contact, First Nations were self-governing societies. While Crown practice in negotiating treaties with First Nations suggests Crown recognition and acceptance of Aboriginal self-government, Aboriginal authority to continue to be self-governing was ultimately denied by the assertion of sovereignty by settling nations and

the establishment of nation-states on the continent. Thus, First Nations were treated in formally unequal terms by European nations under international law and practice. The reasons offered in defence of such formal inequality were not normatively justifiable reasons, in that they were based on unacceptable notions of Aboriginal inferiority. Formal equality supports the recognition of a right of Aboriginal self-government, in that it would seek to place Aboriginal people in the position they would have been in had they been treated as formally equal to European nations at the time of contact. Formal equality underlies normative arguments in favour of a right of self-government based on the fact of prior sovereignty of Aboriginal people.

However, a right of self-government involves more than placing Aboriginal people in the position they would have been in had they been treated as formal equals. It is also a means by which adverse social and economic conditions of Aboriginal people can be alleviated. Many of the debilitating social and economic conditions of Aboriginal people are direct results of historical refusals by Canadian authorities to allow Aboriginal people to make political decisions according to their own political practices concerning matters central to Aboriginal difference. A right of self-government can be viewed as possessing a remedial dimension, in that recognition of the right would permit Aboriginal people to exercise greater control over matters essential to their distinct individual and collective identities, thereby alleviating their disadvantaged economic and social position in Canadian society.

This aspect of the right can also be viewed in terms of equality, namely, principles of substantive equality. Substantive equality refers to the moral ideal of ameliorating adverse economic and social conditions of individuals and groups in order to achieve greater equality among individuals and groups in society.⁹⁶ Recognition of a right of Aboriginal self-government can be justified as a measure that will, it is

hoped, improve the condition of Aboriginal people in Canada. Thus, substantive equality of peoples supports a right of self-government as a means of ameliorating Aboriginal social and economic disadvantage.

Grounding the right of Aboriginal self-government in its underlying value and principles of equality acknowledges and expresses truths of traditional justifications of the right, but does not elevate one or more of them to the status of exclusive justification. Treaty-based claims relate to equality principles, in that the treaty-making process evinces a commitment to equality of peoples. Underlying a claim of prior sovereignty is a deeper moral claim concerning the justice of international legal principles legitimating the assertion of European sovereignty on the continent, i.e., that First Nations were not treated as equals to European nations. The moral force of self-determination discourse and normative claims regarding the protection of minority culture lies in their recognition of the profound value of self-government. Even claims of prior occupancy, related only loosely to normative justifications of the right of self-government, express equality concerns, in that equal treatment demands the recognition of Aboriginal property entitlements. This is not to suggest that framing the right in terms of equality is the only way of conceptualizing its underlying normative dimensions.⁹⁷ However, equality offers a useful and, in my view, compelling framework for assessing the right of Aboriginal self-government, for it speaks to moral values shared by Aboriginal and non-Aboriginal people alike.

CONCLUSION

Under the cover of positive law, the right of Aboriginal self-government possesses complex normative dimensions. Supported by a number of distinct but intersecting normative justifications, the right of self-government is best defended by a combination of arguments, each

supporting a different dimension of the nature of the right. Such a stance blunts critiques based on the contingency of normative thought by consciously refusing to ground the right of self-government in a single normative principle. Prior Aboriginal sovereignty and the injustice of legal principles governing conquest, settlement and sovereignty, together with a more general right of self-determination, are at the core of the right of Aboriginal self-government. Prior occupancy of land provides further support for Aboriginal rights of land management and land use. Treaties entered into by First Nations and the Crown serve as evidence that Aboriginal peoples were self-governing and were treated as such by England and France. Rationales underlying minority cultural rights are also useful in their emphasis on cultural autonomy. When housed in principles of formal and substantive equality of peoples, these perspectives represent a convincing, if not solid, set of normative foundations for the right of Aboriginal self-government.

NOTES

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1. Question 1.9.1, Royal Commission on Aboriginal Peoples, Research Project Proposal, *The Philosophical Bases of Aboriginal Self-Government*.
2. By normative justification I mean a process of reasoning whereby a social, legal or political outcome is defended by reference to norms or principles of justice.
3. Question 1.9.2, research proposal, cited in note 1.
4. See, generally, J. Austin, *The Philosophy of Positive Law* (ed. R. Campbell, 1911); see also O. Fiss, "The Varieties of Positivism", 90 *Yale L.J.* (1981) 1007.
5. See text accompanying notes 47-73.

6. *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
7. For scholarship addressing legal indeterminacy, see Robert W. Gordon, "Critical Legal Histories", 36 *Stan. L. Rev.* (1984) 57; Joseph Singer, "The Player and the Cards: Nihilism and Legal Theory", 94 *Yale L. J.* (1984) 1; Duncan Kennedy, "Legal Formality", 2 *J. Legal Studies* (1973) 351.
8. *Adopted* December 19, 1966, 999 U.N.T.S. 171, entered into force March 23, 1976.
9. G.A. Res. 217A (III), UN Doc. A/77, at 71 (1948), reprinted in *United Nations, Human Rights: A Compilation of International Instruments* 1, UN Doc. ST/HR/Rev.2 (1983).
10. See text accompanying notes 53-57.
11. David Harvey, *The Condition of Postmodernity: An Inquiry Into the Origins of Cultural Change* (1989), p. 41.
12. See Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989); and Richard Rorty, *Contingency, irony, and solidarity* (1989), p. 22 ("we treat everything—our language, our conscience, our community as a product of time and chance").
13. See James Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art* (1988); Martha Minow, "Identities", 3 *Yale J. Law & Humanities* (1991) 97. Cf. Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice", paper prepared for the National Round Table on Aboriginal Justice Issues, Royal Commission on Aboriginal Peoples (1993), p. 137 (cultures "evolve, adapt, are continually subject to interpretation and re-interpretation").
14. See, e.g., Teresa Nahanee, "Dancing With a Gorilla: Aboriginal Women, Justice and the Charter", paper prepared for the National Round Table on Aboriginal Justice Issues, Royal Commission on Aboriginal Peoples (1993).
15. See Ruth Anna Putnam, "Justice in Context", 63 *S. Cal. L. Rev.* (1990) 1797 at 1802 (politics "requires common ideals, a common conception of justice").

16. For an assessment of the strengths and weaknesses of prior or first occupancy as a normative or philosophical basis for the assertion of property rights, see Lawrence C. Becker, *Property Rights: Philosophic Foundations* (1977), pp. 24-31.
17. *Calder v. A.G.B.C.*, [1973] S.C.R. 313; see also *Guerin v. The Queen*, [1984] 2 S.C.R. 335, per Dickson J. at 376-9 ("aboriginal title [is] a legal right derived from the Indians' historic occupation and possession of their tribal lands").
18. *Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518 (T.D.).
19. A.M. Honoré has argued that a 'full' conception of ownership includes, among other things, a right to manage property, i.e., deciding how and by whom a thing shall be used. See A.M. Honoré, "Ownership", in *Oxford Essays in Jurisprudence* (ed. A.G. Guest, 1961) 107. For the view that Aboriginal rights "recognized and affirmed" by section 35(1) of the *Constitution Act, 1982* include not only a right to fish but also "the right to select persons intended to be the recipients of the fish for ultimate consumption, the right to select the purpose for which the fish is to be used, that is, for food or ceremonial purposes, and the method or manner of fishing and...the right...to follow directions of the traditional leaders of the band in conducting the fishery, the place of the fishery and the method of the fishery and the right not to be required to choose between an employee or representative of the Department of Fisheries and the traditional leaders of the Wet'suwet'en people", see *R. v. Nikal*, [1991] 1 C.N.L.R. 162 (B.C.S.C.), per Millward J.
20. It should be noted that while the notion that prior occupancy finds expression in western philosophical traditions, its application to indigenous occupancy of North America was not well received in western philosophical thought. John Locke, for example, argued "Yet there are still *great tracts of land* to be found, which (the inhabitants thereof not having joined with the rest of mankind, in consent of the use of their common money) lie waste, and are more than the people, who dwell on it, do, or can make use of, and so still be in common." (John Locke, *Two Treatises on Government* (rev. ed. P. Laslett, 1963), p. 333). Locke argued that "waste", i.e., uncultivated, land is not occupied or owned and therefore can be appropriated through labour. The Swiss natural law theorist, Emmerich de Vattel, was even more direct:

There is another celebrated question which has arisen principally in connection with the discovery of the New World. It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country....[T]hese tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them. (*The Law of Nations or the Principles of Natural Law* (1964), pp. 85-86.)

Nor did the law apply its acceptance of prior occupancy to Aboriginal occupation of North America. Its application to North America is severely restricted by the legal fiction of underlying Crown title, which posits that the Crown was the original occupant, and therefore owner, of all the lands of the realm. For more discussion of the relationship between Aboriginal title and Crown title, see Kent McNeil, *Common Law Aboriginal Title* (1989).

21. J.J. Rousseau, *Discourse on Inequality* (Penguin ed., 1984), p. 109. See also Immanuel Kant, *The Metaphysics of Morals* (trans. J. Ladd, 1965), pp. 44-56 (first appropriation of land creates rights with respect to that land in certain circumstances); G.W.F. Hegel, *Philosophy of Right* (trans. T.M. Knox, 1942), pp. 37-41 (discussing right of appropriation over all things).
22. Blackstone, II *Commentaries on the Laws of England* (ed. E. Christian), pp. 8-9.
23. Robert Nozick, *Anarchy, State, and Utopia* (1974), p. 151. For commentary, see David Lyons, "The New Indian Claims and Original Rights to Land", in *Reading Nozick: Essays on Anarchy, State, and Utopia* (ed. J. Paul, 1982), pp. 355-379.
24. As quoted in *Delgamuukw v. British Columbia*, Plaintiffs' Opening Address, May 11, 1987, reported at [1988] 1 C.N.L.R. 14, at 18.

25. Unofficial and unverified verbatim transcript, March 15, 1983, as quoted in Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984), p. 29.
 26. Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights", in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (ed. Boldt & Long, 1985), pp. 19-20.
 27. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
 28. Georges Erasmus and Joe Sanders, "Canadian History: An Aboriginal Perspective", in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (ed. Englestad & Bird, 1992), p. 3.
 29. As described by Chief Justice Marshall of the United States Supreme Court, "the character and religion of [North America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. (*Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).)
- Marshall C.J. modified his position in *Worcester v. Georgia* (31 U.S. (6 Pet.) 515, 543 (1832)), stating that "[i]t is difficult to comprehend that the discovery...should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors." The Canadian and Imperial judiciary traditionally ignored *Worcester v. Georgia*, preferring instead the more restrictive approach taken in *Johnson v. M'Intosh*. See, for example, *St. Catherines Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.). See, generally, Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination", 36 *McGill L. J.* (1991) 382 at 396-414.
- For views similar to those recorded by Marshall C.J. in *Johnson v. M'Intosh*, see John Westlake, *Chapters on Principles of International Law* (1984), pp. 136-38, 141-143 (drawing distinction between "civilization and want of it"); W.E. Hall, *A Treatise on International Law* (8th ed. P. Higgins, 1924), p. 47 (international law governs only states that are "inheritors of that civilization"); L. Oppenheim, *International Law* (3rd ed. 1920), p. 126 (law of nations does not apply to "organized wandering tribes"); I.C. Hyde, *International Law Chiefly as Interpreted and*

Applied by the United States (1922), p. 164 ("native inhabitants possessed no rights of territorial control which the European explorer or his monarch was bound to respect"). For a recent treatise arguing that international law now prevents the assertion of sovereignty by settlement over Indigenous people, see J. Crawford, *The Creation of States in International Law* (1979), pp. 176-81; see also "Western Sahara", *I.C.J. Rep.* (1975) 12 at 38-40.

30. *Johnson v. M'Intosh*, at 591.
31. S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims", 75 *Iowa L. Rev.* (1990) 837 at 840.
32. As quoted in Richard Daniel, "The Spirit and Terms of Treaty Eight", in *The Spirit of the Alberta Indian Treaties* (ed. R. Price, 1987), pp. 94-95.
33. Robert Clinton, "The Rights of Indigenous Peoples as Collective Group Rights", 32 *Ariz. L. Rev.* (1990) 739. See also Ward Churchill, "Implications of Treaty Relationships Between the United States and Various American Indian Nations", in *Native Americans and Public Policy*, ed. Fremont J. Lyden and Lyman H. Legters (Pittsburgh: University of Pittsburgh Press, 1992), pp. 149-163; Michael Jackson, "The Articulation of Native Rights in Canadian Law", 18 *U.B.C. L. Rev.* (1984) 255.
34. Clinton, "The Rights of Indigenous Peoples", p. 740.
35. Clinton, pp. 744-45 (footnotes removed; emphasis in original).
36. Treaty with the Cherokees, December 29, 1835, United States—Cherokee Tribe, art. 5, 7 Stat. 478.
37. Reprinted in A. Guttman, *States' Rights and Indian Removal: The Cherokee Nation v. Georgia* (1965), p. 58.
38. John Danley, "Liberalism, Aboriginal Rights, and Cultural Minorities" (review of Kymlicka, *Liberalism, Community, and Culture*), 20 *Philo. & Pub. Affairs* (1991) 168 at 183-85.
39. *The Road: Indian Tribes and Political Liberty* (1980), pp. 270-87.
40. *The Road*, p. 278.

41. *The Road*, p. 270.
42. *The Road*, p. 270 ("Treaties are a form of political recognition and a measure of the consensual distribution of powers between tribes and the United States").
43. See Evelyn J. Peters, Federal and Provincial Responsibilities for the Cree, Naskapi, and Inuit Under the James Bay and Northern Québec, and Northeastern Québec Agreements", in *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (ed. D. Hawkes, 1989), pp. 173-242. See also *Agreement in Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada* (Ottawa: Department of Indian Affairs and Northern Development, 1990).
44. See, for example, *R. v. Sioui*, [1990] 1 S.C.R. 1025.
45. See text accompanying notes 30-32.
46. See, generally, Edward M. Morgan, "The Imagery and Meaning of Self-Determination", 20 *N.Y.U. J. Int'l Law* (1988) 355; Nathaniel Berman, "Sovereignty in Abeyance: Self-Determination and International Law", 7 *Wisc. Int'l L. J.* (1988) 51. See also Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition", 25 *Cornell Int'l L. J.* (1992) 579 at 592 ("Self-determination can be conceptualized as requiring that every culturally and historically distinct people has the right to choose its political status by democratic means, under international supervision, and with international support").
47. S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims", 75 *Iowa L. Rev.* (1990) 837 at 841. See also A Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (1981) pp. 117, 119 (self-determination is "the most important of the principles of international law concerning friendly relations and cooperation among states"). But see Gerald Fitzmaurice, *The Future of Public International Law and the International Legal System in the Circumstances of Today*, in *Évolution et Perspectives du Droit International* (Institut de Droit International, 1973), p. 233 ("juridically, the notion of a 'legal right' of self-determination is nonsense").

48. UN Charter, art. 1(2), June 26, 1945, 1976 Yearbook UN 1043 ("The purposes of the United Nations are...[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples").
49. UN Charter, art. 55.
50. *International Covenant on Civil and Political Rights*, art. 1, opened for signature December 19, 1966, 999 U.N.T.S. 171, entered into force March 23, 1976. Article 1 of the *International Covenant on Economic, Social and Cultural Rights* contains identical language. Additionally, it provides that "all persons may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." (Opened for signature December 19, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.)
51. *Namibia*, [1971] I.C.J. 16, at 31; *Western Sahara*, [1975] I.C.J. 12, at 31.
52. See, generally, Umozurike Oji Umozurike, *Self-Determination in International Law* (1972), pp. 11-26.
53. See, generally, Van Langenhove, *The Question of Aborigines Before the United Nations: The Belgian Thesis* (Brussels: Royal Colonial Institute, 1954).
54. G.A. Res. 1514, 15 UN GAOR Supp. (No. 16), at 66, UN Doc. A/7218 (1969).
55. GAOR 15th Session, Supplement 16, 66.
56. Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), p. 18. For criticism of this approach in the context of Indigenous peoples, see Russel Lawrence Barsh, "Indigenous Peoples and the Right to Self-Determination in International Law", in *International Law and Aboriginal Rights* (ed. Hocking, 1988), p. 68. 🐾
57. See, for example, Lung-Chu Chen, "Self-Determination and World Public Order", 66 *Notre Dame L. Rev.* (1991) 1287 at 1288 ("Self-determination's appeal is rooted in human dignity

and human rights and is linked to the maintenance of world order").

58. Lung-Chu Chen, "Self-Determination", p. 1294 ("the basis for either granting or rejecting the demands of a group should not be whether a given situation is 'colonial' or 'noncolonial', but whether the decision would move the situation closer to goal values of human dignity").
59. Quoted in Thornberry, *International Law and the Rights of Minorities*.
60. UN Doc. E/CN.4/Sub.2/476/Add.5, Annex III, 2. See also Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession From Canada* (Commission on Human Rights, 48th Sess., 1992).
61. See also *Declaration by the International NGO Conference on Discrimination Against Indigenous Populations in the Americas*:
 1. Recognition of Indigenous Nations. Indigenous peoples shall be accorded recognition as nations, and proper subjects of international law, provided the people concerned desire to be recognized as a nation and meet the fundamental characteristics of nationhood: namely, (a) Having a permanent population (b) Having a defined territory (c) Having a government (d) Having the ability to enter into relations with other States...
 4. Accordance of Independence. Indigenous nations or groups shall be accorded such degree of independence as they may desire in accordance with international law. (UN Doc. E/Cn/.4/Sub/21986/7.)
62. *Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub.2/1993/26, released June 8, 1993, prepared by the Chair-Rapporteur of the Working Group on Indigenous Populations.
63. *Draft Declaration on the Rights of Indigenous Peoples*.
64. *Explanatory note concerning the draft declaration on the rights of indigenous peoples*, E/CN.4/Sub.2/1993/26/Add.1, released July 19, 1993, prepared by the Chair-Rapporteur of the Working Group on Indigenous Populations.
65. Avishai Margalit and Joseph Raz, "National Self-Determination", 87 *J. Philo.* (1990) 439. ✍

66. Margalit and Raz, "National Self-Determination", p. 440.
67. Margalit and Raz argue that not all groups enjoy the right of self-determination. In their view, the right attaches only to those groups that possess "characteristics...relevant to the justification of the right." ("National Self-Determination", p. 443.) Given that they base the right in an instrumental defence of the value of self-government, they argue that the right extends to large, historically significant groups that possess common characters and cultures that affect individual identity, where membership is a matter of belonging and mutual recognition. (pp. 443-447) For a discussion of group rights and participatory goods, see Denise Réaume, "Individuals, Groups, and Rights to Public Goods", 38 *U.T. L. J.* (1988) 1. For literature addressing the definition of 'peoples' to which the right of self-determination adheres, see Stavengaven, *The Ethnic Question: Conflicts, Development, and Human Rights* (1990), p. 68; Dinstein, "Collective Human Rights of Peoples and Minorities", 25 *Int'l & Comp. L. Q.* (1976) 102. ✓
68. Margalit and Raz, "National Self-Determination", p. 453.
69. Margalit and Raz, "National Self-Determination", p. 453.
70. See text accompanying notes 29-31.
71. See text accompanying notes 52-56.
72. The *Draft Declaration on the Rights of Indigenous Peoples* avoids this concern by defining the right of self-determination as including rights of political participation within the state structure in which Indigenous peoples find themselves in addition to rights of self-government and political autonomy. See also Pomerance, *Self-Determination Today: The Metamorphosis of an Ideal* ("such complexity can only be handled by means of a flexible approach which sees self-determination as a continue of rights, as a plethora of possible solutions, rather than a rigid absolute right to 'external' self-determination in the form of complete independence"). However, a positivist redefinition of the scope of the right of self-determination in this way does not eliminate the necessity of normatively justifying such a definition. The question still remains: why should Indigenous peoples be entitled to rights of self-government and autonomy *and* be entitled to continue to participate in political structures from which they seek a measure of distance? An answer to this question cannot lie solely in an assertion of a flexible, positivist

international right of self-determination; resort must also be made to principles of justice that normatively support such a stance.

73. Alan C. Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (1992), p. 35.
74. (U.K.) 30 & 31 Vict., c. 3. See also the *Manitoba Act*, R.S.C. 1970, App. II, No. 8.
75. *Ibid.*
76. *Constitution Act, 1982*, ss. 23, 27. See, generally, Cairns, *Charter Versus Federalism*, pp. 62-95; Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987); David J. Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness", 22 *C.J.P.S.*(1989) 699; Thomas R. Berger, "Towards the Regime of Tolerance", in *Political Thought in Canada: Contemporary Perspectives* (ed. Stephen Brooks, 1984), pp. 83-96.
77. UN Charter, arts. 13, 55, 57, and 73.
78. *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1961. Article II defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such...". For links between the concept of genocide and the treatment of American Indians, see Lyman H. Legters, "The American Genocide", in *Native Americans and Public Policy* (ed. Fremont J. Lyden and Lyman H. Legters, 1992), pp. 101-112.
79. *Declaration of the Principles of International Cultural Co-operation*, Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its fourteenth session on November 4, 1966, reprinted in *United Nations, Human Rights: A Compilation of International Instruments*, UN Doc. ST/HR/1/Rev.3 (1988), p. 409.
80. *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 2, para. 2, opened for signature March 7, 1966, 660 U.N.T.S. 195, entered into force January 4, 1969.

81. *The Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Conventions and Recommendations Adopted by the International Labour Conference, 1919-66* (Geneva: ILO, 1966), at 901 and 909. Canada is not party to the Convention.
82. *Ibid.*, arts. 2(1), 2(2).
83. For an assessment of the ILO Convention, see Thornberry, *International Law and the Rights of Minorities*, pp. 334-368. See also Martinez-Cobo, *Analytical Compilation of Existing Legal Instruments and Proposed Draft Standards Relating to Indigenous Rights*, UN Doc. M/HR/86/36, Annex V, for a summary of submissions by indigenous groups sharply criticizing the Convention on a number of grounds.
84. *Partial Revision*, Report IV(2A), p. 8.
85. In fact, Canada made a submission on this point, arguing that the draft Convention's "use of the term 'peoples'...does not imply the right to self-determination as that right is understood in international law" but that "[t]his position is not meant to prejudice the attainment of greater levels of autonomy for indigenous populations at the national level." (*Partial Revision*, Report IV(2A), p. 9.)
86. *Ibid.*, preamble.
87. For more discussion, see Robert A. Williams, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World", *Duke L. J.* (1990) 660 at 668-69:
international human rights law and norms have come to assume a more authoritative and even constraining role on state actors in the world. Government assertions in the international community that abuses of its citizens' human rights are matters of exclusive domestic concern have become more difficult to sustain. Various formal and informal mechanisms have proven capable of ameliorating abusive state practices violative of international human rights instruments and standards. Wanton state violators of international legal norms often pay the price of increasing isolation. Vitally important economic and cultural exchange opportunities are often constricted by the international community in reaction to

a sovereign state's human rights abuses of its citizens....[F]ew governments actively desire pariah status in the international community.

But see Robert Laurence, "Learning to Live With the Plenary Power of Congress Over the Indian Nations", 30 *Ariz. L. Rev.* 413 at 428 ("I have no faith in the ability of public international law to put bread on American Indian tables").

88. See text accompanying notes 4-15.
89. Will Kymlicka, *Liberalism, Community, and Culture* (1989). For commentary, see C. Kukathas, "Are There Any Cultural Rights?" (1992) 20 *Political Theory* 105; Danley, "Liberalism, Aboriginal Rights, and Cultural Minorities"; Don Lenihan, "Liberalism and the Problem of Cultural Membership: A Critical Study of Kymlicka", 4 *Can. J. Law & Juris.* 401. For the view that "dividing power between a federal government and territorial sub-units with ethnically homogenous political majorities is an unlikely solution to ethnic nationalism, unless accompanied by laws and institutions that protect individual and minority rights, ensure each ethnic group adequate voice in national public life, and create direct citizen allegiance to the regime as a whole", see Robert Howse and Karen Knop, "Federalism and the Limits of Ethnic Accommodation: A Canadian Perspective" *New Europe L. Rev.* (1993).
90. John Rawls, *A Theory of Justice* (1971).
91. Kymlicka, *Liberalism, Community, and Culture*, p. 187.
92. Quoted in Jules Deschenes, *Proposal concerning a Definition of the term 'Minority'*, UN Doc. E/CN.4/Sub.2/1985/31, para. 33.
93. Two definitions of 'minority' appear to be vying for international attention. The first is proposed by Special Rapporteur Capotorti: "[a minority is a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language." (*Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Add.1-7.)

The second is proposed by Jules Deschenes: "[A minority is a] group of citizens of a state, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law." (*Proposal Concerning a Definition of the Term 'Minority'*, UN Doc. E/CN.4/Sub.2/1985/31, para. 181.)

94. These ideas are explored at greater length in Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples", 45 *Stanford L. Rev.* (1993) 1311. It should be emphasized that the principles of equality to which I refer apply to peoples, not individuals, and are normative, not legal, principles.
95. See, for example, Aristotle, *Nichomachean Ethics*, vol. V, book 3, lines 1131a10-b15.
96. See, for example, Thomas Nagel, *Equality and Partiality* (1991), p. 12.
97. See, for example, Brian Slattery, "Aboriginal Sovereignty and Imperial Claims", 29 *Osgoode Hall L. J.* (1991) 681 (rights to life and to basic necessities ground right of self-government).

INUIT PERSPECTIVES ON TREATY RIGHTS AND GOVERNANCE

by Wendy Moss

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EXECUTIVE SUMMARY

The topic of treaty rights and governance involves examining ways of reversing the negative impacts of colonialism in the context of Canadian federalism. Treaty rights and governance issues encompass the most fundamental aspects of the relationship between Aboriginal peoples in Canada and the Canadian state. Part 1 of this paper reviews policy statements and publications by Inuit organizations on the subjects of self-government and treaty rights. Part 2 is a report of interviews with Inuit leaders on several issues relating to treaty rights and self-government.

The history of Inuit contact with non-Aboriginal people and with European colonialism has a number of features to distinguish it from that of other First Nations. Inuit have not been subject to the *Indian Act* or confined to reserves. The Canadian government was not active in the North until the 1950s. Although extensive contact with non-Aboriginal people and institutions is relatively recent, it has been highly disruptive to Inuit laws and way of life. Despite the absence of a centralized authority like the European concept of 'the state', Inuit were a self-governing people before the intrusions of European peoples into Inuit lands and Inuit life. Inuit social systems, laws and values have been ignored and displaced by the imposition of government structures and alien laws without Inuit consent.

Inuit self-government rights have been advanced by Inuit organizations within a human rights analysis as well as an Aboriginal rights framework. Inuit have taken a practical and cautious approach to the use of legal and political theories of European origin to advance Inuit rights within a system largely not of their making.

Inuit organizations have argued that the inherent right of self-government is an aspect of the right of self-determination and an

Aboriginal right under Canadian common law. While the right of self-determination occupies a central place in Inuit political aspirations, there is a desire to exercise this right within Canadian federalism, renewed and reformed by constitutionally protected self-government agreements and by constitutional amendments. There is a strong preference in at least three of the four Arctic regions for non-racially based forms of self-government with territorial boundaries that ensure Inuit constitute the majority population of these regions. (The four regions are the Western Arctic, Nunavut, Nunavik, and Northern Labrador.) These non-racially based governments, although referred to by Inuit as 'non-ethnic' or 'public' forms of government, would nevertheless provide protections for Inuit language and culture as well as being subject to the *Canadian Charter of Rights and Freedoms*.

Through their national organization Inuit seek a political accord with the government of Canada reaffirming their status as a unified people across all four Inuit Arctic regions and acknowledging the federal government's commitment to pursue Inuit self-government objectives in all four regions. The obligation of governments to negotiate self-government agreements arises not only from the inherent right of self-government but also from the Crown's fiduciary obligation, which includes an obligation to respect the fundamental human rights of Inuit such as the right to self-determination.

In each of the four Arctic regions, Inuit have pursued, for many years, self-government agreements to implement the inherent right of self-government under the existing Constitution. Constitutional protection of self-government agreements, by deeming self-government agreements to be treaties within the meaning of section 35 of the *Constitution Act, 1982*, is regarded as an essential measure. In addition to constitutional protection under the existing Constitution, Inuit regard constitutional amendments explicitly recognizing the inherent right of

self-government as highly desirable and perhaps essential. Other aspects of the Inuit constitutional agenda include recognition of Aboriginal peoples' governments as one of three orders of government, a consent clause for constitutional amendments affecting Aboriginal and treaty rights, and full and equal participation in all constitutional conferences.

Despite some ambivalence about their identity as Canadian citizens, Inuit appear to wish to resolve this conflict by formally joining Canada as a people with an inherent right to self-government. The mechanisms for achieving this would be constitutionally protected self-government agreements and constitutional reform.

Inuit positions on treaty and governance issues are founded on principles such as the interdependence and equality of all peoples and individuals and the inseverable connection between Inuit and their land. The positions of Inuit organizations also show how individual and collective rights can be reconciled within a human rights analysis and how the notion of equality of all peoples is as important as, and is related to, the equality of individuals.

INUIT PERSPECTIVES ON TREATY RIGHTS AND GOVERNANCE ISSUES

BY WENDY MOSS

For most of Canada's history, the self-government systems of Indigenous peoples have been ignored, hemmed in and at times actively repressed by Canadian governments.¹ Indigenous peoples also were excluded for many years from the right to vote federally and provincially.² Until the 1980s Indigenous peoples were excluded from constitutional discussions.

Inuit experience with European colonization has a number of distinguishing features from the experience of 'Indian' peoples. Although Inuit fall under federal jurisdiction as 'Indians' as the term is used in section 91(24) of the *Constitution Act, 1867*,³ Inuit have been excluded from the application of the federal *Indian Act*⁴ and have never experienced the reserve system. In addition, the Arctic climate provided a relative isolation from extensive contact with non-Inuit until the 1950s.

At that time the federal government became quite active in the North and began to implement numerous policies and actions that greatly affected Inuit lives, such as the settlement of Inuit in permanent communities and away from the nomadic lifestyle they had pursued for thousands of years. Federal and provincial governments were perceived by Inuit as alien and all-powerful.⁵ The federal presence was so intrusive that it displaced or seriously disrupted Inuit customary law and traditional Inuit social systems.⁶ Zebedee Nungak has described this process as it affects Inuit in Northern Quebec:

When authorities of the Government of Canada, represented by the Royal Canadian Mounted Police, became the chief arbiters of justice among Inuit, traditional methods and customs of

dispensing justice were immediately and completely displaced by the new order. The King's (or Queen's) authority, represented by the police and courts, became the only system of justice. There was no place for Inuit traditions, and neither was there any regard for how things were done before. An utterly foreign system of justice was imposed upon the Inuit, and the role of the Elders and leaders rendered useless. The new representatives of British justice totally ignored the values, traditions, and customs of the Inuit in their determination to have their laws abided by. Crown law, vaguely and not understood at all by Inuit (Wishes of the Great White Monarch for His Subjects), became supreme.⁷

Before the intrusions of European traders and Canadian government agents, Inuit society fit David Maybury-Lewis' definition of a tribal people: a small-scale pre-industrial society living in comparative isolation and managing their own affairs without any centralized authority such as the state.⁸ The lack of state government structures, as Europeans knew them, has been used as an excuse to deny the existence of indigenous self-government systems and the right of self-determination to Indigenous peoples. Inuit were nevertheless self-governing as all human societies are in the absence of colonialism. From an Inuit perspective, the lack of a state does not make them any less a people with a right of self-determination. Pauktuutit (the Inuit Women's Association) has identified one of the most critical differences between Inuit and Qallunaat (literally, 'persons with pale or white faces') in conceptualizing and recognizing the existence of self-governing societies — the use and priority placed upon formal institutions of government and written law. Despite the absence of these in Inuit traditions, Inuit demand recognition as a society with its own laws and institutions:

The customary laws of most native peoples have been historically ignored or had their existence denied because they did not fit into Western concepts of what laws should be. The laws were not usually written down, nor were there people with special authority to enforce the laws, and punishments for

misbehaviour were often applied irregularly against offenders. However, these societies did have strict codes of behaviour that were understood by all members of the society. People who did not follow this code of behaviour could expect to face a range of reactions from the community. These societies were self-governing and able to maintain a relatively peaceful and stable existence.⁹

Zebedee Nungak also has cautioned against Eurocentric judgements of Inuit society:

The radical transformation of Inuit life in the Arctic which has transpired over the past forty years can lead the uninformed to the erroneous conclusion that Inuit did not possess any semblance of a justice system before contact with European civilization. That our people lead a nomadic existence in a harsh unforgiving Arctic environment may lead Qallunaat or others to conclude that Inuit did not have a sense of order, a sense of right and wrong and a way to deal with wrongdoers in their society. Inuit did possess this sense of order and right and wrong. The way it was practised and implemented may never have been compatible with European civilization's concepts of justice, but what worked for Inuit society in their environment was no less designed for conditions of life in the Arctic than that of Qallunaat was for conditions of their life.¹⁰

The topic of treaty rights and governance involves examining ways of reversing the negative impacts of colonization in the context of Canadian federalism. The process of decolonization has just begun for Inuit with the advent of land rights agreements (modern treaties) and self-government negotiations in four Canadian Arctic regions: the Western Arctic, Nunavut, Nunavik and Northern Labrador. Treaty rights and governance issues therefore encompass the most fundamental aspects of the relationship between Indigenous peoples and the Canadian state. The political and legal mechanisms that should be used to reflect a renewed and more equitable relationship between Canada and the Indigenous peoples living in Canada have been the focus of many constitutional reform discussions in the 1980s and in 1992. Since the 1992 constitutional referendum, self-government and treaty rights have

continued to be a central focus of discussions between Canada and Aboriginal peoples.

At a research workshop held by the Royal Commission on Aboriginal Peoples in January 1993, a number of these issues and some options for defining the relationship between Aboriginal peoples and the Canadian state were discussed in a preliminary way with representatives from several national Aboriginal organizations, including the Inuit Tapirisat of Canada. This research study is intended to follow up the work begun in the treaty rights and governance research workshop by exploring in more detail Inuit perspectives as contained in public statements by Inuit organizations and leadership in Canada, as well as the international voice of Inuit, the Inuit Circumpolar Conference.

The topic of governance can encompass a wide range of matters, from the right of self-determination under international law, to the constitutional expression of Aboriginal peoples' self-government rights, to the range of regional and community self-government objectives of Aboriginal peoples.

Similarly, the topic of treaty rights encompasses a wide range of issues such as the domestic and international legal status of treaties, the role of land claims agreements as vehicles for addressing self-government objectives, the legal and political nature of comprehensive land claims agreements, and the potential for constitutionally protecting self-government agreements under the Constitution as it now stands.

All these issues and the connection between treaty rights and governance are of concern to Inuit. Part 1 of this paper reviews policy statements of the Inuit Tapirisat of Canada, its member organizations, the Inuit Committee on National Issues and the Inuit Circumpolar Conference on the subjects of self-government, treaty rights and the relationship between Inuit and the Canadian state. Part 2 is a report of interviews with Inuit leaders on several issues relating to treaty rights

and governance: the *Canadian Charter of Rights and Freedoms*; Inuit identity and Canadian citizenship; the fiduciary duty of the federal Crown; constitutional protection of self-government and land claims agreements; and the nature of the inherent right of self-government. This paper provides an overview of Inuit perspectives on treaty rights and governance issues in the following areas (though not necessarily under these headings):

1. citizenship and the relationship of Inuit to the Canadian state;
2. Inuit identity as a people within Canada and within the circumpolar region;
3. constitutional reform and the inherent right of self-government;
4. Inuit models of self-government in Canada;
5. the relationship between the inherent right of self-government, ethnicity and the regional self-government objectives of Inuit in Canada;
6. the relationship between the fiduciary duty and the inherent right of self-government;
7. the status of self-government agreements as treaties; and
8. Inuit positions regarding the right to self-determination under international law and its relationship to the inherent right of self-government under Canadian law.

PART 1 — REVIEW OF INUIT STATEMENTS AND PUBLICATIONS

Inuit and the Right of Peoples to Self-Determination

In Inuktitut, the language of the Inuit, ‘Inuit’ means ‘the people’ and in this sense refers only to the people formerly called ‘Eskimos’, a term regarded by Inuit as pejorative. ‘Inuit’ can also mean ‘people’ and in this sense can refer in a generic way to other ethnic or racial groups as well.¹¹

Inuit statements about the relationship of Inuit to Canada and their place in the world often identify Inuit as a people in the political and legal sense, that is, as possessing the equal rights of peoples under international human rights law including the right to self-determination. In English, Inuit have also referred to themselves collectively as a 'nation' or a 'nation of people' with a distinct language, culture, society and a homeland encompassing most of Arctic Canada. In 1980, the Inuit Committee on National Issues (ICNI) described Inuit as a nation of people who were recognized as such, along with other Aboriginal peoples, by the *Royal Proclamation of 1763*. ICNI explained the central constitutional problem facing Inuit since 1867 as the failure of Canada properly to respect this nation-to-nation concept and clearly to recognize the constitutional status of Inuit as a people.¹²

A comprehensive statement of policy principles by the Inuit Circumpolar Conference (ICC) asserts that "Inuit are a distinct Indigenous people, with a unique ancestry, culture and circumpolar homeland that transcends political boundaries."¹³ The ICC has also stated that Inuit must be regarded as subjects of international law and that the status of Inuit internationally and within Canada is that of a people:

It is critical that Inuit be recognized and referred to both nationally and internationally as a distinct 'people'. Inuit are not mere 'populations' or 'minorities'. These latter terms serve to unfairly deny or undermine the true status, rights, and identity of Inuit as Indigenous peoples. Inuit rights will be advanced only if states use accurate terminology and concepts and respect Inuit perspectives.¹⁴

In various presentations, Canadian Inuit have asserted their status as a people within Canada and a corresponding right to maintain that status within Canada, as well as the circumpolar world. In 1987 the Inuit Committee on National Issues¹⁵ stated that the survival and development of Inuit as a people in Canada depend on explicit

constitutional provisions and on land claims policies informed by recognition of the principle of self-government¹⁶. The failure to respect the status of Inuit as a nation or people within Canada is evidenced, Inuit say, by the imposition of government structures and laws alien to Inuit without their consent¹⁷.

Rosemarie Kuptana, president of the Inuit Tapirisat of Canada, has stated that the starting point for understanding the conceptual context of Inuit self-government objectives is recognition of the status of Inuit as a people and of the right of all peoples to self-determination.¹⁸ In the view of ITC, the right of self-determination in the form of complete independence probably arises only when there is a gross denial of fundamental human rights to a people within a state. In this regard, Canada has nothing to fear from Indigenous peoples so long as it continues efforts to negotiate self-government arrangements.¹⁹ The right of self-determination can be expressed in many ways other than complete independence. It encompasses expressions internal to existing states such as joining with other peoples in a federal state.²⁰ The domestic self-government agenda of Inuit in Canada (constitutional reform and the negotiation of self-government arrangements within Canada's constitutional framework) is therefore regarded as an aspect of the Inuit right to self-determination.

ITC and ICC statements on Inuit self-government and self-determination rights are firmly grounded in a human rights analysis consistent with international human rights norms. Inuit also say the right to self-government is an existing Aboriginal right. This has important implications for the recognition of the inherent right of self-government without constitutional reform. If the inherent right of self-government is an existing Aboriginal right within the meaning of section 35(1) of the *Constitution Act, 1982*,²¹ then it is arguably constitutionally protected and capable of being implemented without constitutional reform.

This purported dual character of the inherent right of self-government raises questions about the relationship between Aboriginal rights and human rights and about how group/Aboriginal rights can be reconciled with human rights. Inuit maintain that some Aboriginal rights are fundamental human rights (for example, the right of self-determination) and that the right of self-determination and individual rights are interdependent. In a submission to the Royal Commission on Aboriginal Peoples in March 1994, ITC said that the dual character of the inherent right of self-government as an Aboriginal right and as a fundamental human right means, first, that the right to self-government was and is not subject to extinguishment (since human rights can not be extinguished) and, second, that the right to self-government is therefore an existing right within the meaning of section 35. The ITC submission also asserted that the common law doctrine of Aboriginal rights has often been used as a means of restricting Indigenous peoples' right of self-determination and suggested that some aspects of the common law of Aboriginal rights should be revisited to ensure compliance or consistency with international human rights principles, such as the equality of all peoples and the equal rights of all peoples. ITC maintains that the fiduciary obligation of the Crown requires that governments respect the fundamental human rights of Inuit, including the right of self-determination.²² As means to accomplish this, ITC recommended recognition of the inherent right of self-government in a constitutional amendment, and recognition of Indigenous' peoples right of self-determination under a United Nations instrument on Indigenous peoples' rights.

Inuit have at times characterized their Aboriginal right to self-government as arising from the special status of Aboriginal peoples as nations within Canada.²³ In recent years, ITC has tended to avoid arguments based on special status in favour of an analysis focusing on

equality rights at a collective level.²⁴ An equality rights analysis of collective rights and Inuit aspirations for self-government has been present in Inuit statements for sometime. This is evident in the 1983 presentation of the ICNI to a joint committee of the Senate and the House of Commons, where Inuit argued an equal right for Inuit communities to shape government institutions in Canada:

Unlike immigrant minorities which came to a new land, drawn by the promise of opportunity or freedom, we did not move into a pre-defined society in the knowledge that we would have to learn new languages and adjust to new ways. Rather, we were here in full possession of our land, making decisions according to our own way of doing things.

A new and imported legal system simply ignored all that, and we found ourselves without recognized rights. Our fundamental rights to make our living using the resources and lands we had always used were denied or ignored. By virtue of our location, remote from your population centres, and sometimes — as with the Indian peoples — by virtue of the law, we were outside the political system. We did not vote and had not the opportunity, legal or otherwise, to do so. Even today our population is fragmented and divided among provincial and federal electoral districts, so some candidates or incumbents do not even find it worth the time to travel to the north to campaign and speak to use.

This situation is unacceptable. We believe we have the right to participate fully and equally in Canadian political life and in the electoral process. *Through land claim agreements, constitutional change and regional governments in the N.W.T., Northern Quebec and Labrador, we want to gain powers and opportunities at the local or regional level to give us equality with other Canadians.* What we need now are similar powers and opportunities at the national level.²⁵ [emphasis added]

It can be argued that any special status or rights that Aboriginal peoples have with respect to self-government in Canada arise not from their ethnicity or 'aboriginality' but from their status as members of peoples who have been subjected to colonialism and have had their rights of self-determination denied. A UN expert has said that the right of self-determination can be regarded as an individual right as well as a

collective right in that it is every person's right that the people of which he or she is a member be free of colonialism and be able freely to determine its own political, economic, social and cultural condition.²⁶ As is evident from the passage just quoted, Inuit have distinguished their situation from that of immigrant populations who have chosen Canada and whose right of self-determination is arguably met by the federal and provincial governments. Rosemarie Kuptana has argued that the status of colonized peoples is implicit within the meaning of 'Indigenous peoples':

The term 'indigenous peoples' is not used by us to claim special status or special rights but to name collectively the peoples for whom the right of self-determination is denied. In the context of self-determination, it is not an anthropological term, but rather a socio-political term to name various peoples who have experienced colonization but for whom the right of self-determination is denied in an arbitrary, and therefore discriminatory fashion.²⁷

Inuit have called for the application to Inuit of existing international human rights standards that affirm the equality of all peoples and that recognize the right of all peoples to self-determination.²⁸ In particular Inuit have said that article 1 of two UN human rights covenants²⁹ that recognize the right of all peoples to self-determination must be applied to them. In a statement to the Preparatory Committee of the World Conference on Human Rights, the Inuit Circumpolar Conference stated that an indispensable part of reaffirming the universality, indivisibility and interdependence of all human rights is a reaffirmation of the equal rights of all peoples and recognition that Indigenous peoples are full members of the human family in this regard.³⁰ Universality of human rights means that all human beings (in the case of individual human rights) and all peoples (in the case of collective human rights) possess the same inalienable and fundamental human rights. The concept of indivisibility is related to universality.

Indivisibility means entitlement to the full range of human rights for all people; that is, a given individual or group can not be entitled to some human rights and disentitled to others. The concept of interdependence means that the full enjoyment of a given human right is related to, or dependent upon, the enjoyment of other human rights. In March 1994 ITC stated,

We assert the right of self-determination by invoking human rights standards that purport to be universal and that purport to be concerned with the fundamental dignity and equality of all peoples. Human rights are either universal or they are not. The issue of recognizing us as a people with the equal rights of peoples is an issue of equality.³¹

ITC and ICC have emphasized the interdependence of individual human rights with the right of self-determination and have pointed out that the UN itself regards the right of self-determination as a prerequisite and precondition for the implementation and preservation of all other human rights.³² The interdependence between individual and collective human rights has been commented on by the ICC:

It is the view of Inuit that the equality of all peoples is a concept vitally important to the full protection of *individual* human rights as well as the rights of peoples. It is after all, theories of racial, cultural and group superiority that are so often used to rationalize violations of individual human rights. Inuit firmly believe that equal respect by all peoples for all peoples would significantly contribute to the respect of the rights of individuals and we firmly believe that this concept is a fundamental cornerstone in the task of addressing racism, xenophobia and other forms of intolerance.³³

The Inuit view of human rights considers collective and individual human rights as necessary and complementary elements of an effective and holistic human rights regime. Inuit organizations have supported the current draft "Declaration of the Rights of Indigenous Peoples"³⁴ of the United Nations Working Group on Indigenous

Populations because it reflects this vision of human rights.³⁵ With respect to self-determination the draft declaration provides in article 3:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The active role of Inuit in contributing to this UN drafting process since 1985 is described by Dalee Sambo in an article entitled "Indigenous human rights: The role of Inuit at the United Nations Working Group on Indigenous Peoples".³⁶

Ethnicity and Inuit Self-Government Aspirations

The significance of the Inuit claim to a distinct identity as a people in Canada has been explained in the following terms:

It is not our race in the sense of our physical appearance that binds Inuit together, but rather it is our culture, our language, our homelands, our society, our laws and our values that make us a people. Our humanity has a collective expression, and to deny us recognition as a people is to deny us recognition as equal members of the human family. Individual human rights protections will allow us to assimilate into the dominant society, but they will not allow us to survive as a people, and therefore will not allow us to survive as Inuit.³⁷

This statement makes an important distinction between race and culture and the relationship of each to self-government rights. The right of self-determination is seen as a fundamental human right of Inuit to express their sense of community as a people — not because of racial (i.e., physical) distinctions — but because of the common values and aspirations that bind them together. When Inuit assert a distinct identity as a people, they are asserting a right to express their collective identity not just in the private sphere but publicly and politically as well. Inuit aspirations to self-determination are not a form of xenophobia, nor are Inuit aspirations the type of ethnic group demand Daniel Patrick Moynihan speaks of, where "people define who they love by whom they

hate".³⁸ Inuit positions reveal a recognition of the interdependence of peoples in the modern world and a commitment to respecting the fundamental human rights of all people and all peoples. This is evident in the embracing of domestic and international human rights norms, in the interest in Canadian federalism and in non-racially based forms of self-government, and in the active interest of organizations such as the Inuit Circumpolar Conference in global issues such as peace and the environment.

Inuit organizations frequently distinguish between 'ethnic' and 'non-ethnic' forms of government. The notion of 'public' or 'non-ethnic' government is a distinctive preference of the regional Inuit organizations that constitute the Inuit Tapirisat of Canada. 'Non-ethnic' governments are defined by Inuit organizations as governments where participation and voting requirements are not restricted by race, ethnicity or descent.³⁹

Michael Ignatieff draws a similar distinction between "civic nationalism" and "ethnic nationalism" in his recent book, *Blood & Belonging*. Nationalism he defines as the belief that the world's peoples are divided into nations and that each nation (or people) has the right of self-determination, either as self-governing units within existing states or as nation-states of their own. Ignatieff defines "civic nationalism" as the belief that the nation should be composed of all those — regardless of race, colour, creed, sex, language or ethnicity — who subscribe to the nation's political creed. Further, he says, civic nationalism envisages the nation as a community of equal, rights-bearing citizens, united in patriotic attachment to a shared set of political practices and values. Ethnic nationalism is defined as the belief that an individual's deepest attachments are inherited, not chosen, and that it is the national community that defines the individual and not individuals who define the community.⁴⁰

Violent conflicts in Europe and Africa between different ethnic groups (often of the same race) have become a major international concern. Some contemporary observers assume that attaching political value to preserving ethnic diversity leads ultimately to ethnic conflict given that the vast majority of states are multi-ethnic in nature.⁴¹ As a result, the value of ethnicity is being attacked and the practicality of actually applying the right of self-determination to *all* peoples called into question. David Maybury-Lewis points out that the value of maintaining ethnic diversity is now often referred to pejoratively as 'tribalism':

Tribalism is a dirty word now used, all too often, as a pejorative way of referring to ethnicity. Ethnicity is no more than the sense, however strongly or weakly felt, of belonging to a certain people. Tribalism is used to emphasize the divisive effects of ethnic affirmation.⁴²

Daniel Patrick Moynihan's book, *Pandaemonium: Ethnicity in International Politics*, focuses on the aftermath of the disintegration of the U.S.S.R. into numerous nation-states. He mourns the loss of "relative stability" in international relations he says existed during the Cold War. While not regretting the end of the Cold War or the Communist East Bloc, Moynihan views the aftermath as a much more violent period. For this, he blames ethnicity, which he views as "primal" and "primitive". In his view, the aftermath of the Cold War is "pandaemonium" (the capital of Hell in *Paradise Lost*), because the breakdown of central authority has allowed ethnic identities to assert themselves:

Pandaemonium [the book] was written as a warning. It appeared to me that the world was entering a period of ethnic conflict, following the relative stability of the cold war. This could be explained. As large formal structures broke up, and ideology lost its hold, people would revert to more primal identities. Conflict would arise based on these identities. Indeed, the world had already been introduced to the words 'ethnic cleansing'.⁴³

Ignatieff, Maybury-Lewis and Moynihan all seem to agree that the attachment of human beings to group identities seems to satisfy an individual need for belonging and that history has proved these attachments to be strong and lasting. However, there is a difference of opinion about whether attachments to ethnic identities are inherently threatening to the cause of peace and to individual human rights. Moynihan and Ignatieff would seem to say they are. Maybury-Lewis on the other hand sees the political expression of ethnic diversity as something states have attempted to suppress, and it is the suppression of ethnic identities that is the problem:

The idea that taking other peoples' cultures seriously and making an effort to coexist with them will lead to endless ethnic strife is simply not true. By and large we have been too fearful even to try doing this seriously. If we had devoted anything like the amount of energy to making federalist systems work as we have to trying to stamp out 'the ethnics' and to homogenize large-scale societies, I think we would be in much better shape today than we are...

What we think we're dealing with is 'tribals' — people clinging to their own groups and fighting their neighbours — but in fact, people have been clinging to their own groups for their identity ever since the beginning of human history and they're going to go on doing that as far as I can see. The problem in the modern world is not 'tribalism'. The problem is that we have so systematically and unsuccessfully attempted to suppress these units of identity that human beings appear to need.⁴⁴

Based on the positions taken in constitutional and international forums, Inuit appear likewise to hold that the correct approach to inter-ethnic peace is not to repress national or ethnic identities but rather to recognize their equal rights to survive and determine their political future. For Inuit, this seems to mean recognizing the right of each nation to survive while acknowledging the reality of the interdependence of peoples within states and internationally. In this view, the cause of inter-ethnic peace and the survival of all nations requires mutual respect and support.

Non-ethnic governments can be a legitimate means of realizing the inherent right of self-government (right of self-determination) of Inuit while recognizing the interdependence of peoples in Canada. One of the clearest explanations of why Inuit have focused so much of their efforts on non-ethnic forms of government is contained in an ITC constitutional position paper presented to the Right Honourable Joe Clark in February 1992:

A non-ethnic government reflecting the values and goals of the majority Inuit population while respecting the rights of the minorities would be a form of self-determination within Canada. Given the geographic and demographic features of the Canadian Arctic this form of government would be an appropriate model for many Inuit in regard to our traditional territories. Since most Inuit regions intend to pursue this model, non-ethnic forms of government must be explicitly recognized as available aboriginal self-government options in any constitutional amendment. The precise form of Inuit models of self-government will be determined through regional negotiations and conclusion of specific self-governing agreements. It is expected that in the agreements the exclusive and concurrent authorities of our governments will be defined as well as the paramountcy of our governments in certain areas. Guaranteed Inuit representation and entrenchment of acquired Inuit rights within these governments will also be included in specific self-government agreements to protect Inuit in the event of future demographic changes. The preference of most Inuit for non-ethnic government lies in the belief that this represents the most efficient and equitable means to provide good government for all residents. However, each Inuit regional organization will decide whether to conclude arrangements for either ethnic or non-ethnic based government. This will be a decision made by each organization at the regional level and will depend upon whether non-ethnic government agreements provide an adequate expression of Inuit self-government goals, including the proper protection of Inuit language and culture. These negotiated agreements must be constitutionally protected, as 'treaties' within the meaning of section 35(1) of the *Constitution Act, 1982*.⁴⁵

The use of the term 'non-ethnic' in this context can be unintentionally misleading; the word 'ethnic' is sometimes used in

reference to different races, meaning groups of people distinguishable from one another by physical attributes, while in other situations 'ethnic' is used in a cultural context, to refer to groups of people distinguishable from one another by their social values, ways of life, art, etc. Inuit generally seek self-government structures in which racial descent is not a factor in determining citizenship. However, this does not mean there will not be ethnic components to the self-government arrangements that Inuit seek in the North. Inuit organizations expect that new non-racially based governments in the North will nevertheless provide Inuit with culture and language guarantees. Inuit organizations also clearly expect that, by having control of governments in the territories (through the ballot box as the majority population), Inuit cultural values will be expressed and reflected in those new governments (without violating the human rights of non-Inuit in those territories). Inuit organizations refer to these governments as non-ethnic or public forms government, though non-racially-based governments may be the more accurate term.

Perhaps the best known example is the desire of Inuit to create a Nunavut Territory out of the eastern half of the Northwest Territories. The purpose of Nunavut, as described in the first formal proposal for the settlement of Inuit land rights issues in the Northwest Territories, was as follows:

...the basic idea is to create a Territory, the vast majority of people within which, will be Inuit. As such, this Territory and its institutions will better reflect Inuit values and perspectives than with the present Northwest Territories.⁴⁶

While the Inuit proposal for a Nunavut territorial government underwent many revisions between the 1976 proposal and the enactment of the *Nunavut Act*,⁴⁷ the fundamental notion of ensuring cultural survival through control of a non-racially-based democratic government has remained constant. The federal government recognizes this

objective. At a meeting of Aboriginal affairs ministers on the inherent right of self-government in Quebec City in May 1994, the federal government described Nunavut in terms of Inuit self-determination and cultural survival. This reflects an understanding of the flexibility and scope for implementation of the right of self-determination/inherent right of self-government, and an understanding that non-ethnic forms of government can serve the interests of cultural survival in regions where Aboriginal people are the majority population (and are expected to remain so). Self-determination under the non-ethnic model can be achieved by ensuring that the boundaries of the territory of the new governments include a majority Inuit population.

Two other Inuit land claims regions have stated a preference for non-racially-based governments in their traditional territories, the Western Arctic and Northern Quebec.⁴⁸ The opportunity to exercise jurisdiction over Crown lands as well as Inuit settlement lands through non-ethnic governments appears to be the primary motivating factor behind the Inuit preference for this model of self-government. Inuit are well aware of the deprivations suffered by Indian peoples in the South when confined to Indian reserve lands.

Inuit have been careful to say that their choice of non-ethnic government is premised on the continuing majority status of Inuit in their traditional lands. Inuit organizations have indicated that they may have to consider so-called ethnic-based governments should Inuit become a minority in their homelands. Seeking some other form of self-government under these circumstances would be consistent with an understanding of the right of self-determination as a continuing right of a people to determine their political future and the form of self-government best suited to them. Using descent requirements in order to determine citizenship is not unknown to liberal democracies. Many countries determine citizenship on the basis of descent from existing

citizens either exclusively (Germany) or in combination with immigration (Canada and the United States). Alternatively, Inuit may seek some form of guaranteed representation in the new governments in order to provide for any radical changes in demographics.

It may be possible to establish non-racially-based territorial or regional governments in ways that recognize as a source of power the inherent powers of Aboriginal peoples. Inherent powers are defined in *Black's Law Dictionary* as powers that are enjoyed by the possessors of a natural right, without having been received from another.⁴⁹

Aboriginal peoples, like the provinces when they entered Confederation, can be regarded as bringing with them into Confederation their own inherent powers.⁵⁰ The future scope of the powers of new government structures can be defined through self-government agreements without necessarily having to define the scope of inherent powers as they existed before self-governments agreements were concluded.

Insisting on a particular theoretical basis for the source of the powers of the new governments could result in a lengthy delay in achieving the goal of self-government. Perhaps some Inuit will accept delegated powers from federal and/or provincial governments as the shortest route to achieving their regional self-government goals. On the other hand, Inuit may insist on government structures whose powers are defined under federal or provincial legislation, either with some recognition that the original source of these powers is the people themselves or some guarantee that the powers cannot be taken back by federal or provincial governments. Federal or provincial legislation could be regarded as simply defining, for purposes of greater certainty, the agreed upon powers of a newly recognized or established government. Aboriginal peoples could be regarded through this legislation as receiving *back* powers that were appropriated through the process of colonization. Careful drafting can allow the Aboriginal party

and the government to read the legislation in their own way. For example, the *Yukon First Nations Self-Government Act*⁵¹ seems carefully to avoid the term 'granting' and instead describes Yukon First Nations as "having" the power to enact laws in relation to matters listed in an attached schedule. The term 'having' can be read as consistent with clarifying the scope of 'inherent' law-making powers.

Alternatively, the fact that it is federal legislation that is defining the jurisdiction of the First Nations can be read as an indication of devolution or delegation of federal power. In other words, it is left ambiguous whether First Nations have the powers enumerated in federal legislation because it has been granted by the federal government or because First Nations have always had these powers. (This ambiguity would arise only if section 35 of the *Constitution Act, 1982* is read as including the inherent right of self-government within the meaning of "existing aboriginal and treaty rights".)

In this regard, it is interesting to note that a joint Inuvialuit and Gwich'in proposal for a regional 'public' government in the Western Arctic emphasizes that the powers of the regional government would be devolved rather than delegated from the federal government.⁵² A recent framework agreement to guide self-government negotiations between the government of Quebec and the chief negotiator for the Nunavik constitutional committee likewise anticipates discussions on "devolving" powers to a Nunavik Assembly.

Delegation of powers is usually understood as a transfer of powers from one branch of government to another, where the granting power has the right to take back the powers. *Devolution* of powers on the other hand can convey a permanent transfer of power to the recipient. Powers received from the federal government in a constitutionally entrenched self-government agreement are perhaps more properly regarded as a devolution of powers. Devolution may be

regarded as more consistent with recognition of the inherent right of self-government than delegation would be.

It is also worth noting that while the joint Gwich'in-Inuvialuit proposal calls for federal legislation to establish the regional government and to set out the scope of powers it may exercise, the source of the proposed regional government's legitimacy and its law-making authority is described as coming from the communities within the region. Federal legislation would describe the limits of the new government's powers but that power could be exercised only as and when the communities agree that the regional government should do so:

The Committee proposes a model of regional government with wide ranging authority. It would hold many powers currently held by either the Government of the Northwest Territories or the Government of Canada. These powers would not be delegated, but rather devolved in legislation. Some authorities, or law making abilities would be paramount to those currently enjoyed by the Government of the Northwest Territories... It is emphasized that any particular legislative power of the regional government would take effect only when, and as the regional assembly (made up of elected community councillors) so decides to exercise the given legislative power. Any law making authority to be exercised by the regional government would have to be conferred by the communities through their representatives in the regional assembly. The proposed regional government will have no legislative powers unless, and until, the communities through their representatives in the regional assembly wish to confer a given power to the regional government.⁵³

In addition, 'ethnic' or 'non-ethnic' governments may be established at the *community* level by either Gwich'in or Inuvialuit under this proposal.

Inuit interest in the option of inherent law-making powers is evident in the following ITC statements made in the context of constitutional reform discussions:

Sovereign lawmaking powers in Canada cannot be divided exclusively between the federal and provincial levels of government, with other governmental bodies exercising only

those powers and authorities delegated to them by the senior levels of government. The Constitution of Canada must be amended to clearly establish the self-governing rights of aboriginal peoples. Other distinct regions of the country have negotiated entry into Confederation and have been allowed the exercise of exclusive legislative powers over matters of local concern. Aboriginal peoples have not been permitted this same opportunity to conclude terms of union with Canada and have them reflected in the Constitution. The myth of English and French speaking Canadians as the two founding peoples of Canada ignores the contributions and needs of aboriginal peoples as Canada's first citizens. It is this political inequality that a self-government amendment must address. In past rounds of constitutional discussions, the debate has focused on whether aboriginal peoples should accept delegated powers from the federal or provincial governments. Aboriginal peoples continue to insist we have never given up our self-governing rights and therefore, they cannot be delegated to us by others.⁵⁴

Interest in inherent law-making powers is explained in part by the need for regional Inuit organizations to come to the self-government negotiating table with some power of their own that is recognized at the outset:

...the entrenchment of the inherent right to self-government will create a greater equality in bargaining positions when it comes to negotiate specific agreements. It will create a greater incentive to the federal and provincial governments to negotiate in good faith.⁵⁵

Inuit organizations have begun to map out the connections between the concepts of Aboriginal rights and human rights. Inuit self-government proposals have been advanced within an Aboriginal rights framework and a human rights analysis and attempt to maximize the benefits of both. The ultimate goals of Inuit self-government proposals have been clear and consistent — democratically elected governments in the traditional territory of Inuit that reflect Inuit aspirations and values.

Pragmatism Versus Theory

Inuit leaders often say they are concerned primarily with the end goal of realizing self-government structures suitable to the needs of Inuit communities and are less concerned with debates over abstract political or legal principles. The ways Inuit have articulated the Inuit right of self-government in a political and legal system largely not their making is seen perhaps as a means to an end. The vehicle for achieving self-government is seen perhaps as less important than the end itself — the reassertion of Inuit control over Inuit life. The theoretical foundations of arguments used in a legal and political system dominated by non-Inuit are primarily tools to translate Inuit political objectives into a conceptual framework that is persuasive to Canadian society as a whole. This is evident in remarks by the late Inuit leader Mark R. Gordon, who said that the concepts of land claims and Aboriginal rights were introduced by non-Inuit lawyers and were "a tool not of our invention" but were used by Inuit "with the intention to run our own lives".⁵⁶ Inuit have taken a practical and cautious approach to using western legal traditions as a tool for achieving Inuit goals. This is evident in the following statement by the Inuit Tapirisat of Canada:

At the political level, the uneven power relationship between aboriginal peoples and non-aboriginal decision-makers has provided little opportunity for aboriginal peoples to shift discussion from conceptual frameworks rooted in western legal traditions towards some more neutral ground. The decision to work within a common law framework, a human rights framework or some other conceptual framework to articulate Inuit self-government rights is a strategic decision influenced by a range of complex political, legal and other factors. Needless to say, Inuit are placed at some disadvantage in attempting to express Inuit perspectives of Inuit rights through an alien legal system.⁵⁷

Inuit aspirations for self-government and self-determination within their lands have often been expressed as a desire for greater

control over Inuit life. For example, the Inuit Ratification Committee described one of the objectives of the Nunavut Land Claim Agreement as being to ensure "that Inuit will have more control over the way they live, and will help to protect the Inuit way of life".⁵⁸ In a survey of views of Inuit women, Pauktuutit states: "Aboriginal self-government is not an abstract concept which needs definition; it is the means by which Inuit can regain control over their lives."⁵⁹

Current social and economic problems and deprivations that Inuit experience are regarded as having a political dimension, as being intimately connected to the violation of Inuit civil and political rights, particularly the right to self-determination. In this regard, the Inuit Tapirisat of Canada has stated:

The current "circumstances" of aboriginal peoples (poor socio-economic conditions, loss of land, a lack of political autonomy and threatened cultures and languages) are not accidental nor did they arise from neutral political acts of European settler populations. Colonialism is a purposeful exercise of power to subjugate other peoples, based on theories of cultural and racial superiority and is one of the most serious human rights violations."⁶⁰

The impact of colonialism on Inuit is typically described in terms of the imposition of alien laws and values with a disregard for, and a negative impact on, the pre-existing social, economic and political systems of Inuit. For example, Josepi Padlayat of the Inuit Committee on National Issues states:

When the Qallunaat, or white people, began coming to our land in great numbers, we shared our land and our resources with them; and suddenly our homeland became a jurisdiction governed by someone else's laws. Our children were taught to speak a different language from that of our people, and we were immersed in a whole new way of life, whether we liked it or not. In short, the newcomers paid little heed to the fact that we had rights to our land and to our own political, cultural and economic systems. So we are participating in the a current process to demonstrate that as the original inhabitants of what is

now referred to as the Canadian arctic and sub-arctic, we have distinct rights which must be recognized in the highest and most fundamental of Canadian laws, the Constitution.⁶¹

The Inuit Circumpolar Conference states:

As Arctic aboriginal people, Inuit have rights to the possession, ownership, and control of surface and subsurface resources within their traditional territories... It is important to recognize that violations or abuses of the fundamental rights of indigenous peoples are most frequently related to development issues. Developments imposed by states and third parties have served to deprive indigenous peoples of their right to self-determination, an adequate land and resource base, means of subsistence, and other human rights.⁶²

While the current self-government agenda of Inuit in Canada includes international, constitutional and regional objectives, the primary focus is the negotiation of regional or territorial government structures in each of the four Inuit land claims areas: the Western Arctic, Nunavut (Eastern and Central Arctic), Nunavik (Northern Quebec), and Northern Labrador. The positions taken nationally by Inuit organizations in constitutional discussions and other intergovernmental meetings are driven by the needs and objectives of the regions that make up the ITC board of directors, along with a nationally elected president and the president of Pauktuutit. (The Nunavut region is composed in turn of three regions, each with their own representative on the ITC board: Baffin, Kitikmeot and Keewatin.) The objectives of the regional Inuit organizations are determined through continuing community consultations. The regional and territorial government structures sought by regional Inuit organizations are described more fully later in this paper.

With respect to jurisdictional powers, the ICNI has said that Inuit seek provincial-type powers in areas such as education, health, justice, culture, recreation, housing and renewable resource management, as well as some authority in areas of federal jurisdiction such as the offshore

and its resources, and contact with Inuit in other parts of the circumpolar world.⁶³

The Inuit agenda was summarized recently in the following words:

The implementation of our right to self-determination will be pursued in a cooperative and practical manner with all Arctic States including Canada, but the Inuit agenda is first and foremost premised upon our recognition as a people. We are a people who have been subjected to the sovereignty of Canada without our consent, without recognition of our collective identity as a people and in violation of our right to self-determination under international law. This must be rectified by several initiatives: the negotiation of regional self-government agreements, constitutional entrenchment of the inherent right of self-government, and the full recognition of the right of indigenous peoples to self-determination, under international human rights standards.⁶⁴

Inuit and Citizenship

Inuit in Canada identify with Inuit throughout the circumpolar world. As a constituent member of the Inuit Circumpolar Conference, ITC endorses ICC statements identifying Inuit as a single people living throughout the circumpolar world. At the same time, within the context of constitutional negotiations and self-government discussions within Canada, Inuit identify as a people in Canada and as Canadian citizens. Thus, Inuit exist as a people within Canada and within the circumpolar world.

Inuit organizations at all levels have stated repeatedly that Inuit do not wish to exercise their right of self-determination through secession (i.e., complete independence). Inuit in Canada have stated repeatedly a desire for "internal self-determination" through the negotiation of self-government agreements at the regional level and constitutional amendments expressing the status of Inuit as a people with inherent self-government rights in Canada. These measures are

regarded as necessary, along with the settlement of Inuit land claims, as an essential means of including the Inuit as equal partners in Confederation. For example, the Inuvialuit land claims agreement (the Inuvialuit Final Agreement) and the Inuvialuit proposal for a regional government for the Western Arctic are intended to allow equal opportunity for Inuit participation in Canadian society while ensuring the retention of Inuvialuit culture and identity. Inuvialuit have emphasized their dual identity as Inuvialuit and Canadians.⁶⁵

ITC has explained the choice of Inuit in Canada to exercise their right of self-determination within Canada as follows:

Throughout the constitutional negotiations, we explained our sense of exclusion from Canada, and the central issue we brought to the constitutional table was the desire of Inuit to finally join Canada, as a people and as equal partners in Confederation. We have selected this means of expressing our right under international law to self-determination for a number of important reasons:

1. our bargaining power within Canada as an equal partner in Confederation is stronger than it would be as a small nation outside it;
2. partnership with Canada is practical and desirable in and of itself; Inuit have a strong attachment to Canada and identify positively as Canadians as well as a nation of people awaiting inclusion in the federation;
3. even assuming a separate state was desirable, we do not believe it would be economically feasible and therefore separation would not be politically responsible, given our small numbers and the socio-economic challenges of the North (under international law however, small population and economic considerations do not qualify the right to self-determination).

The Inuit agenda for the exercise of our right to self-determination is not to secede or remain separate from Canada, but to enter Canada as a people, and to share a common citizenship with other Canadians. We say this with no intent to judge the choices other peoples may make, but to ensure that the Inuit path to self-determination is clearly understood.⁶⁶

In a similar vein, the Inuit Circumpolar Conference states:

The right of self-determination is a prerequisite and pre-condition for the implementation and preservation of all other human rights. This fundamental right includes the right to self-government. By exercising self-determination in circumpolar regions, Inuit do not seek to dismember existing states but rather to contribute to and strengthen Arctic countries. For matters affecting Inuit and the Arctic, these states have a duty to involve Inuit and obtain their consent to proposed initiatives.⁶⁷

Thus, Inuit in Canada wish to join Canada as a distinct yet integral part of Confederation and in a way that explicitly recognizes the place of Inuit as a people in Canada with an inherent right of self-government. Many but not all Inuit identify as Canadian citizens. A sense of exclusion stemming from the failure to recognize the distinct identity of Inuit in Canada as people with their own language and culture appears to be a major factor. In a 1991 survey of Inuit women, Pauktuutit reports:

As the tables at the end of this section indicate, a large majority of the women (84%) believe Inuit should have a say on national issues, including Canadian unity and constitutional reform, and an equal number believe that the constitution should recognize Aboriginal self-government. Sixty per cent (60%) of the women say that they think of themselves as Canadian. This is surprisingly low, for throughout the previous round of constitutional negotiations Inuit leaders maintained that their people felt strongly about their identity as Canadians. One woman commented that she would be able to see herself as a Canadian 'if Canada and Canadians gave recognition and protection to Aboriginal languages and culture and treated us equally'. In fact, 72% of the respondents believe there is racism against Inuit in Canada and 64% report personal experiences of racism. Thus, the women in this study feel strongly that Inuit should be involved in national decision-making but they are much less confident about being accepted as Canadians. Moreover only one in five of the women (20%) believe the federal government deals fairly with Inuit.⁶⁸

In a presentation to the thirty-second premiers conference (1992) ITC stated that "Inuit view themselves as Canadians — an integral and uniquely original part of Canadian society" and that "survival of a

distinct Inuit identity means the survival of an integral part of Canadian identity". However for some Inuit (as the report of interviews with Inuit leaders in Part 2 reveals), Canadian citizenship is a political fact of life that Inuit have come to accept because they believe they have no other choice. And for others, attachment to the notion of Canadian citizenship is an attachment to the land rather than the state. The Pauktuutit survey reveals that more than a third of the Inuit women involved did not identify as Canadian citizens.

Constitutional Reform and the Inherent Right of Self-Government

Substantive Inuit involvement in constitutional reform issues at a national level can be traced to 1978 with the appearance of Inuit representatives before a special committee of the Senate and the House of Commons, where they proposed ways for Inuit to become involved in the constitutional reform process.⁶⁹ In 1979 Inuit obtained observer status at a first ministers conference on the Constitution, and the ICNI was created to develop national positions on constitutional reform. From 1979 until it was disbanded in 1987, the ICNI under the leadership of individuals such as John Amagoalik and Zebedee Nungak developed and presented national Inuit positions on constitutional reform matters to a great variety of parliamentary committees and ministerial committees on the Constitution.

In 1980, Inuit supported the patriation of the Constitution, provided there were certain constitutional protections for Inuit rights. ICNI participated in the series of constitutional conferences between 1983 and 1987 prescribed by section 37.1 of the *Constitution Act, 1982*. These conferences were intended to elaborate on the meaning of "existing aboriginal and treaty rights" in section 35(1) of the Act. Inuit worked closely with other Aboriginal peoples in Canada to secure the

entrenchment of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982* and toward the *Constitutional Proclamation, 1983* that ensures, through amendments to section 35, constitutional protection for rights under land claims agreements, as well as sexual equality in the enjoyment of Aboriginal and treaty rights. Mary Simon of ICNI was one of the key figures pressing for the sexual equality amendment now contained in section 35(4) of the *Constitution Act, 1982*.

In the later conferences, Inuit and other Aboriginal peoples focused a good deal of effort on securing constitutional recognition of the inherent right of self-government and a process for negotiating and constitutionally protecting self-government agreements. Explicit constitutional provisions respecting the inherent of self-government have been regarded as a means of including Inuit formally as a political partner in Confederation and as a necessary tool to prevent assimilation and the loss of an Inuit identity in Canada.⁷⁰ Apart from the specific constitutional conferences devoted to Aboriginal rights, ICNI put forward Inuit perspectives on a wide range of constitutional matters such as senate reform and the 1987 Meech Lake Accord.

In a 1987 publication, ICNI summarized some of the outstanding constitutional objectives of Inuit:

ICNI is seeking constitutional entrenchment of the following:

- recognition of aboriginal peoples as culturally distinct by virtue of their historic occupation of the lands that now comprise Canada;
- recognition of aboriginal peoples' right to retain, use and develop their own languages and cultures;
- recognition of aboriginal peoples' right to the ownership and use of lands and waters (including sea-ice) as a necessary condition of their self-sufficiency;
- recognition of aboriginal peoples' right to participate in the harvesting and management of renewable resources

- and in the management and development of non-renewable resources;
- recognition of aboriginal peoples' right to self-government;
- a legal mechanism for negotiating self-government at local, regional, territorial and provincial levels;
- protection of the agreements that result from the negotiations on self-government;
- recognition of the principle that aboriginal governments must be adequately financed.⁷¹

Following the failure of the 1987 First Ministers Conference on Aboriginal Rights to produce a self-government amendment, the federal and provincial governments shifted their attention to Quebec's constitutional agenda and in the course of doing so, excluded Aboriginal peoples from the constitutional negotiations that led to the 1987 Meech Lake Accord. The issue of full participation in all constitutional conferences affecting Aboriginal peoples' rights and an Aboriginal consent mechanism for constitutional amendments affecting Aboriginal rights had been an issue raised by ICNI for many years. Inuit representatives joined with other Aboriginal peoples in protesting their exclusion from the negotiations leading to the Meech Lake Accord. This mistake was not repeated when constitutional negotiations on a wide range of matters of national concern resumed in March 1992. Inuit and other Aboriginal peoples were included in the full range of meetings of officials, constitutional affairs ministers and first ministers on aboriginal rights and self-government but also on senate reform, the division of powers, and a distinct society clause for Quebec.

This constitutional reform process began with the federal proposals for constitutional reform released in September 1991, developed into negotiations between the governments and Aboriginal peoples in March 1992, and ended with the August 1992 Charlottetown Accord and the constitutional referendum in October 1992. Throughout this period, the Inuit constitutional agenda maintained a high level of

consistency. Beginning with an Inuit Assembly on the Constitution held in mid-September 1991 in Pangnirtung, ITC focused largely on three main principles throughout the discussions and negotiations leading to the Charlottetown Accord:

1. constitutional recognition of Inuit as a distinct people;
2. constitutional entrenchment of the inherent right of self-government of Aboriginal people as well as a process for negotiating self-government agreements and entrenching the agreements themselves; and
3. full, equal and direct participation of Inuit in all stages of the constitutional reform process.⁷²

These three principles were reflected to a large degree in the Charlottetown Accord. The final outcome respecting the third point fell short of Inuit goals: while full and equal participation was provided Inuit in the Charlottetown Accord process, the Accord itself would have restricted future participation to "matters directly affecting" Aboriginal peoples. During the negotiations leading to the Charlottetown Accord, these three principles were supplemented by others such as recognition of Aboriginal peoples' governments as a third order of government under the Constitution; recognition of inherent law-making powers under a provision called the 'context clause'; and Aboriginal peoples' consent to proposed amendments affecting Aboriginal rights provisions in the Constitution.

The importance of the outstanding constitutional agenda of Inuit is evident in ITC statements. Inuit have repeatedly expressed a sense of exclusion from the Canadian political process and insist that there is a need to invite Inuit formally as a people within the federation. The President of Inuit Tapirisat of Canada states:

There are two fundamental flaws respecting the existing Constitution from an Inuit viewpoint. One is a flaw in the way

the Constitution has been made. The other is a fundamental flaw in its content. The existing Constitution [apart from the Aboriginal rights provisions in the *Constitution Act, 1982*] and the governments created under it were imposed upon Inuit without our consent. No one came and asked us about where the boundary lines of provinces should be or what powers federal and provincial governments should have. The recent plebiscite in N.W.T. on the proposed territorial boundaries is a notable and very recent exception. Not surprisingly, this flaw in process has led to a flaw in the content of the Constitution — it fails to recognize aboriginal peoples as having any law-making power of our own. In constitutional terms, we do not exist as a people except as an object of federal power.⁷³

The proposed constitutional amendment recognizing Aboriginal peoples' governments as an order of government would have qualified the division of power provisions of the *Constitution Act, 1867* in respect of federal and provincial governments by taking into account the inherent right of self-government of Aboriginal peoples. The president of Inuit Tapirisat of Canada has stated:

The exclusion of aboriginal peoples from the division of powers is a fundamental violation of our human rights as a people. It can be corrected in part by including in the Constitution the recognition of our "inherent" right of self-government... This is an issue of fundamental principle that speaks to the very nature of the relationship between aboriginal peoples and the rest of Canada. We are seeking constitutional statements on our right to self-government that reflect the fact that Inuit are equal to any other people in Canada. We are seeking constitutional statements that reflect this sense of equality and that will reverse the current values expressed in the Constitution of domination and subordination of aboriginal peoples by governments controlled by non-native people. For example, under a part of the Constitution to be called the Canada Clause, the governments of aboriginal peoples are recognized as one of three orders of government in Canada. This reflects the principle that the governments of aboriginal peoples have a constitutional status like the federal and provincial governments.⁷⁴

During the 1990s Inuit brought a strong human rights analysis to the constitutional table that explained the nature, source and significance

of the inherent right of self-government and its relationship to the regional self-government objectives of Inuit. The distinctiveness of Inuit as a human society, their status as a people, and the inseparable connection of Inuit to their homelands are regarded as the source of the inherent right of self-government.⁷⁵ The word 'inherent' suggests the nature of the inherent right of self-government as a fundamental human right:

the word 'inherent' is used in the preamble of the United Nations' covenants on human rights. It is therefore part of the international language of human rights, and as Inuit use the word 'inherent' with reference to self-government, it signifies the notion of rights that can be recognized but not granted, rights that may be unlawfully violated but that can never be extinguished.⁷⁶

ITC has articulated some elements of the inherent right of self-government from an Inuit viewpoint:

1. it is a pre-existing and fundamental human right and therefore not subject to extinguishment (inherent);
2. the inherent right of self-government exists independent of any self-government agreement (non-contingent);
3. governments established by aboriginal peoples in exercise of the inherent right constitute an order of government with constitutional status (aboriginal peoples' governments are one of three orders of government in Canada that are sovereign within their spheres of jurisdiction);
4. the consent of aboriginal peoples is necessary in defining the relationship between aboriginal peoples' governments and federal and provincial governments (consent requirement);
5. the inherent right of self-government does not prescribe any particular form of government and therefore encompasses ethnic and non-ethnic forms of government (Inuit are not restricted to traditional forms of government or from joining with others in the exercise of their inherent right of self-government).⁷⁷

In March 1992, at the beginning of the constitutional negotiations, ITC tabled draft amendments in response to the federal

government's proposals on matters such as the Canada clause and the distinct society clause. The Inuit amendments also addressed the inherent right of self-government and sexual equality rights. With respect to sexual equality, ITC recommended that the existing equality provision applying to the enjoyment of Aboriginal and treaty rights (section 35(4) of the *Constitution Act, 1982*) be broadened. In an explanatory note to the draft amendments ITC stated,

It can be argued that the rights of aboriginal women are now fully protected by the combined operation of sections 15, 28 and 35(4) of the Charter.

However, there are concerns that the section 25 exemption from the Charter for aboriginal and treaty rights and "other rights or freedoms that pertain to the aboriginal peoples of Canada" may override the specific sexual equality guarantees in section 28. Another concern is that s. 35(4) may not be broad enough to cover the very general reference to "other rights and freedoms" in section 25.

Regardless of the merits of the arguments on either side, the draft wording suggested here would make explicit a restriction on all governments — federal, provincial and aboriginal peoples — preventing them from passing laws or creating or recognizing rights in a way that discriminates between women and men. This is done in two ways: first, by broadening the wording of section 35(4) by adding the words 'the rights and freedoms referred to in section 25' and second, by explicitly stating that the section 35(4) guarantee of equality rights applies to the laws of federal, provincial and aboriginal peoples governments.⁷⁸

In March 1992, ITC also tabled a draft amendment recognizing the inherent right of self-government and recommended that this provision be separate from section 35(1), which affirms "existing" Aboriginal and treaty rights. This was done for two reasons:

1. to clearly avoid any arguments flowing from the word 'existing' — that the inherent right of self-government for any aboriginal people in Canada has been extinguished in any manner;
2. to clearly signal recognition of an existing and third order of government with constitutional status.⁷⁹

This approach was ultimately adopted in the Charlottetown Accord (and the accompanying draft legislation released in September 1991) along with a broadened sexual equality provision, a Canada clause provision recognizing Aboriginal peoples' governments as an order of government, and other positions consistent with Inuit positions.

The negotiations and consultations within the Inuit community leading up to the Charlottetown Accord and the constitutional referendum process ultimately resulted in a high level of national consensus among Inuit about the self-government amendments. In the constitutional referendum of October 1992, Inuit communities voted strongly in favour of the Charlottetown Accord. Despite the negative results of the referendum at the national level, Inuit insist that the political recognition of the inherent right of self-government by ten provincial governments and the federal government is not something that can be taken back.⁸⁰

Since the failure of the Charlottetown Accord, Inuit have set for themselves a self-government agenda that can be achieved within the existing constitutional framework. This self-government agenda envisages new northern governments in the four Arctic regions corresponding to the four Inuit land rights settlement areas (or 'comprehensive claims'). The Inuit constitutional agenda remains outstanding and will be pursued again when the opportunity arises:

the Inuit "yes" vote in the national referendum demonstrates a strong national consensus among Inuit about the central principles relating to self-government that must be included in the Canadian Constitution. And as we have now said on several occasions, the recognition of the inherent right of self-government by the federal and provincial governments is an irreversible and defining moment in Canadian history. The Inuit leadership will pursue our outstanding constitutional agenda at an appropriate time in the future. In the meantime, Inuit have charted a course for the achievement of certain Inuit self-

government objectives within the existing constitutional framework.⁸¹

Treaties, Treaty Rights and Constitutional Protection of Self-Government Agreements

From an Inuit perspective, the exercise of treaty making through the land claims process and through self-government agreements is regarded as an important means of reasserting control with respect to land, resources and Inuit life in general. It is also seen as an essential process of including Inuit within Confederation as a people and as partners in Confederation. Inuit feelings of alienation and exclusion appear to be connected to Canada's failure to deal with the fundamental rights of Inuit as a people, particularly in the area of self-government, language and culture. This in turn has led to a less than enthusiastic embracing of Canadian citizenship, as the Pauktuutit study and the interviews reported in Part 2 of this paper reveal.

The Inuit experience with treaties has been restricted to the modern treaty-making process of land claims settlements, beginning with the 1975 James Bay and Northern Quebec Agreement. It is clear that Inuit would like to see the modern treaty-making process expanded to include self-government agreements with constitutional protection. Over the years, regional and national Inuit organizations have said regional self-government arrangements must receive constitutional protection and that there must be a specific constitutional provision recognizing in a general way Aboriginal peoples' right of self-government. In 1987 the ICNI stated:

But although the creation of Nunavut would provide two-thirds of Canada's Inuit with their own government, in the absence of constitutional amendment it would not provide constitutional protection for Inuit self-government in the North. Consequently, constitutional protection of aboriginal peoples' right to self-government continues to be a priority for Inuit. Entrenchment of a process for arriving at and constitutionally protecting self-

government agreements is necessary for the long-term security of all aboriginal peoples.⁸²

In 1987, the federal government revised its land claims policy and, among other changes, allowed, so it said, for a "broader range of self-government matters to be included in claims negotiations". The 1987 policy statement⁸³ on its face does not exclude the possibility of constitutional protection for self-government agreements as part of land claims agreements, but as a matter of practice the federal government has insisted on 'parallel' negotiations in order to exclude self-government arrangements from constitutional protection.

The current federal government has indicated some openness to broadening its opportunities for constitutional protection of self-government agreements. In a speech in May 1994, the Honourable Ron Irwin indicated that he would likely bring before cabinet in the fall of 1994 the issue of deeming self-government agreements treaties within the meaning of section 35 of the *Constitution Act, 1982*. The government of Quebec has also demonstrated some openness to constitutional protection of self-government agreements but it is not clear to what extent. Newfoundland has usually said that it does not support constitutional protection for self-government agreements in the absence of an explicit constitutional amendment recognizing the inherent right of self-government.

Although Inuit and others (including some provincial governments such as Ontario and Saskatchewan) have rejected this argument, explicit constitutional provisions recognizing the inherent right of self-government and providing for constitutional protection of self-government agreements is clearly preferable. Arguments contrary to the Newfoundland position can be found in Janet Keeping's *The Inuvialuit Final Agreement*.⁸⁴ For example, rights under treaties and land claims agreements could be regarded as constitutionally protected

without being regarded as part of the Constitution, in which case, the constitutional amending formula would not be a concern.

Therefore, constitutional protection for self-government agreements, independent of whether the inherent right is an existing Aboriginal right, may be obtained by characterizing self-government agreements as ‘treaties’ or including them within land claims agreements. Section 35(1) affirms and recognizes existing Aboriginal and treaty rights. Section 35(3) includes, within the meaning of treaty rights, rights acquired under land claims settlements. Together these sections suggest two possible means of constitutionally protecting self-government agreements — either by characterizing self-government agreements as treaties or by inclusion of self-government matters in land claims agreements.

Nevertheless, Inuit have some concerns about constitutional protection of self-government agreements in the absence of a provision explicitly recognizing the inherent right of self-government because of reservations about the common law doctrine of Aboriginal rights. ITC has made the following caution:

Constitutional entrenchment of self-government agreements may be a means of injecting Inuit perspectives into the constitution but the problems inherent in the existing doctrine of aboriginal rights would remain. Efforts should be made to redefine the common law and the Constitution to better reflect Inuit perspectives of Inuit rights and to make Canadian law regarding aboriginal rights consistent with international human rights standards concerning the equal rights and self-determination of peoples.⁸⁵

While maintaining that the inherent right of self-government is already protected under section 35, Inuit are well aware of the risks of litigating this fundamental issue within a legal system that has a vested interest in affirming its own legitimacy. Inuit would clearly prefer an

explicit amendment affirming the inherent right of self-government as well as constitutional protection for self-government agreements.

It is not clear what international status, if any, such treaties might have from an Inuit perspective. The Inuit Circumpolar Conference has made the following statement of principle regarding the significance of treaty making and the inviolability of treaty rights:

The significance of land rights settlements or treaty-making between Inuit and state governments should be recognized as an important means of ensuring proper respect for Inuit rights to land, resources, and other fundamental matters. Whenever land rights settlements or treaties are entered into, the inviolability of Inuit land rights or treaty rights must be guaranteed in the national legal system of the state party concerned.⁸⁶

Regional Inuit Self-Government Objectives Within the Existing Constitutional Framework

In the aftermath of the Charlottetown Accord and the 1992 constitutional referendum, Inuit organizations looked for ways to realize some of the self-government objectives of the regional Inuit organizations within the existing constitutional framework. Long-standing proposals for each of the four land claims regions have been pursued for many years independent of the constitutional reform process. The collective decision by Inuit organizations at the regional level to pursue self-government negotiations within the existing constitutional framework carries some risk in terms of constitutional protection of self-government agreements (see earlier discussion).

The goal of creating Nunavut in the Eastern and Central Arctic had been pursued vigorously for more than 20 years independent of the periodic focus of constitutional talks on Aboriginal self-government. Throughout the constitutional discussions in 1992, separate negotiations continued between the Tungavik Federation of Nunavut and the government of Canada on a land rights agreement covering the Eastern

and Central Arctic. The Nunavut Land Claim Agreement was ratified by Inuit in November 1992 and signed by the prime minister in May 1993. Nunavut means 'our land' in Inuktitut and refers to both the eastern and the central portion of the Northwest Territories and to the territorial government that is planned for the new territory.⁸⁷ Under article 4 of the Nunavut Land Claim Agreement, the federal government commits itself to introduce legislation to establish Nunavut separate from the government of the remainder of the Northwest Territories. Throughout the negotiations, Inuit insisted that any agreement on land rights in the Eastern and Central Arctic had to be linked to agreement on the long-standing aspiration of Inuit for Nunavut. (A referendum on the issue in 1982 supported division of the N.W.T. to create Nunavut.)

In the Western Arctic, Inuvialuit have sought a negotiation process with the federal government concerning their proposal for a Western Arctic Regional Government within the remainder of the Northwest Territories after division. The Inuvialuit wish to conclude a self-government agreement on this matter before division takes place. At one time, the Western Arctic was included in the Nunavut proposal. However, the Inuvialuit land claim was negotiated separately, and the boundary for Nunavut was ultimately determined as excluding Inuvialuit territory in the Western Arctic.

The 1984 Inuvialuit Final Agreement (IFA) does not address self-government other than to provide a guarantee that Inuvialuit will not be treated any less favourably than any other group with respect to public government structures in the Western Arctic⁸⁸. This commitment to discuss public government issues with the Inuvialuit has been triggered now by discussions in N.W.T. on a new constitution for the western half left after the creation of Nunavut and by the terms of the 1991 Gwich'in land claims agreement. The Gwich'in agreement

commits the federal government to self-government negotiations with the Gwich'in at the community and regional levels and states that

The objectives of self-government agreements shall be to describe the nature, character and extent of self-government, the relationship between government and Gwich'in institutions and to accommodate Gwich'in self-government within the framework of public government.⁸⁹

In June 1994, the federal government agreed to begin a negotiation process with the Gwich'in and the Inuvialuit regarding a Western Arctic Regional Government. The municipalities and the territorial government will participate in these discussions.

In Northern Labrador, the Labrador Inuit Association seeks an agreement on self-government covering the Labrador Inuit settlement area either as an integral part of their land claims agreement or in a separate self-government treaty. Progress in the land claims negotiations with the federal and provincial governments has been minimal and slow. In addition, there appear to be significant differences between the government of Newfoundland and Labrador Inuit on the potential territorial scope of Inuit self-government in Northern Labrador.

In Northern Quebec, Inuit wish to consolidate and expand upon the powers exercised by institutions created under the James Bay and Northern Quebec Agreement, such as the Kativik Regional Government (KRG). The KRG is regarded by Inuit as an administrative entity, and the Inuit of Northern Quebec now seek a proper legislative body — a Nunavik Assembly. The KRG is a non-ethnic public administration in the northern third of the province on which representatives of thirteen villages sit. By virtue of their majority status, Inuit effectively control the KRG. The financial dependence of the KRG on the province because of its limited taxing capacity has hampered the ability of the KRG to function effectively. In 1987, the ICNI concluded that "the KRG lacks the

degree of autonomy that would properly qualify it as an institution of self-government."⁹⁰

Conclusions such as these on the part of Northern Quebec Inuit communities led to the current proposal for a Nunavik Assembly. In May 1994, the government of Quebec appointed a negotiator to discuss this issue, and a framework agreement to guide negotiations was reached in July of the same year. There is no commitment yet from the federal government to participate in these discussions. (The Quebec-Inuit framework agreement on self-government negotiations considers federal participation necessary in matters directly involving federal jurisdiction.)

The interest of the federal and provincial governments in discussing Inuit self-government objectives has not been consistent over the years. Consequently, the loss of the commitment to negotiate self-government with Aboriginal peoples under the Charlottetown Accord was considered significant by Inuit. Shortly after the referendum, ITC began discussing a "national Inuit self-government process". In a resolution passed at the Inuit Tapirisat of Canada board meeting of 8 December 1992, the national Inuit leadership was instructed to "take steps to immediately enter into discussions and conclude an agreement with the federal government to establish an Inuit self-government negotiation process available to each Inuit region and suitable to the needs and objectives of each region and which permits bilateral and trilateral negotiations". The president and vice-president of ITC met with the Honourable Jean Chrétien in 1993 when he was leader of the opposition and while the Liberal Party of Canada was preparing its policy statement on Aboriginal affairs. The Liberal Party ultimately committed its support to the establishment of a national Inuit self-government process in its party platform.⁹¹

In several meetings with ITC, the minister of Indian affairs, the Honourable Ron Irwin, has assured ITC president Rosemarie Kuptana

that the federal government stands behind the commitments in the Liberal 'Red Book', as the party platform is commonly referred to. The federal government has also indicated an interest in a political accord with ITC on implementing Red Book commitments. ITC has proposed a political accord specifically on the subject of self-government as a means of implementing the Red Book commitment to the national Inuit self-government process. At the time the ITC proposal was first put forward, the federal government had not committed itself to begin a negotiation process with the Inuvialuit concerning regional public government in the Western Arctic. There is now a negotiation process available to each region, but there is no formal federal policy or statement on Inuit self-government.

The primary purpose of a political accord would be to reaffirm the relationship between the federal government and all Inuit in Canada, to reflect the existence of Inuit as a unified people living in four Arctic regions, and to record the commitment of the federal government to participate in the negotiation of self-government structures in each of the four Arctic regions. ITC has said that the role of the federal government in negotiating and implementing Inuit self-government will be slightly different for each of the Inuit regions:

With respect to the Western Arctic Region, the federal government would commit itself to bilateral negotiations with the Inuvialuit Regional Corporation in cooperation with the Government of the Northwest Territories respecting the establishment of a Western Arctic Regional Government. With respect to Nunavik, the federal government would commit itself to join the negotiations between the Government of Quebec and Northern Quebec Inuit respecting the establishment of the Nunavik Assembly, when invited to do so by those parties. With respect to Nunavut, the Government of Canada would reaffirm its commitment to work cooperatively with Nunavut Tunngavik and the Government of the Northwest Territories towards the establishment of the Nunavut Territorial Government as previously agreed, while ensuring that Inuit organizations in the

Nunavut region have the resources to have meaningful input into the work of the Nunavut Implementation Commission. With respect to Northern Labrador, the federal government would commit itself to continue to work cooperatively with Labrador Inuit and the Government of Newfoundland toward the ratification of a comprehensive self-government agreement.⁹²

In addition to securing a formal political commitment to regional Inuit self-government objectives, ITC is also seeking financing commitments for the regional Inuit organizations for self-government negotiations and for ITC itself to co-ordinate self-government issues at the national level. The proposed political accord would therefore pull together into a national document federal commitments respecting the self-government objectives of Inuit.

Overall, ITC believes that the federal government has not devoted as much attention to Inuit self-government objectives as it should, in contrast to the existence of a federal policy for pursuing "Indian community self-government negotiations" for First Nations communities. ITC and its member organizations are now pressing for Inuit-only programs in areas such as self-government, housing and many others. There is a sense that too often Inuit are dealt with as afterthought to programs designed primarily for the very different circumstances of First Nations. An equally important concern is the federal offloading of its fiduciary and program responsibilities for Inuit onto provincial and territorial governments.

Inuit Models of Self-Government

Inuit have said that the purpose of constitutional reform is not to articulate models of self-government but rather general principles that recognize the place of Inuit in Canada — that recognize Inuit as a people with an inherent right of self-government and a right to protect and promote Inuit language, culture, traditions and values. Specific models

of Inuit self-government are to be addressed through regional self-government negotiations. Inuit have indicated a preference for non-ethnic forms of government but have not excluded ethnic-based models as a possible option for the future.

Specific proposals for each of the four land claims settlement areas of the Arctic have been developed. Non-ethnic forms of government are attractive for their potential to ensure control and management over Crown lands in Inuit traditional territory as well as Inuit settlement lands. Inuit control through non-ethnic forms of government is premised upon the existence of an Inuit majority in the territories concerned (for example, Nunavut) or, alternatively, structures of government that will ensure a strong Inuit voice even in a minority situation (proposals for a Western Arctic Regional Government have addressed this situation). There is a desire to leave open the option for so-called ethnic forms of self-government.

With respect to the Eastern Arctic, article 4 of the Nunavut Land Claim Agreement committed the federal government to recommend legislation to Parliament to create the Nunavut Territorial Government. The *Nunavut Act*⁹³ was passed by Parliament in July 1993 and is to come into force no later than 1 April 1999. The legislative powers of the new territorial government are established by sections 23-27 of the Act and include, among other matters, the administration of justice, municipal and local institutions in Nunavut, hospitals and charities, direct taxation, licensing, property and civil rights, education, the preservation, use and promotion of the Inuktitut language, the preservation of game, and generally all matters of a merely local or private nature. The Nunavut Territorial Government can also exercise control over the management and sale of certain public lands. Section 28(2) provides that the federal cabinet may disallow any law made by the legislature within one year of its enactment. Inuit will have a

significant role in planning the implementation of the *Nunavut Act*. Part II of the Act establishes a Nunavut Implementation Commission. Three of the nine Commissioners are selected from a list of nominees submitted by Tungavik Inc. The remainder are selected by the federal government and the government leader of the Northwest Territories.

There is no provision in the Nunavut Land Claim Agreement or the implementing legislation excluding Article 4 (the commitment to establish Nunavut) from constitutional protection as part of the land claims agreement. However, the Nunavut Political Accord and the *Nunavut Act*, which set out the details of this commitment, are excluded from constitutional protection by the terms of article 4.1.3 of the land claims agreement. Thus the commitment to establish the Nunavut Territorial Government (NTG) is constitutionally protected but not the legislative powers of the NTG as these are set out in the *Nunavut Act*. Nunavut Tunngavik⁹⁴ would prefer greater constitutional protection for the Nunavut government and would also like to continue discussions with the federal government on the scope of its jurisdiction, particularly in the area of natural resources.⁹⁵

Section 2.7.4 of the Nunavut final agreement states that nothing in the agreement shall be construed so as to deny Inuit are an Aboriginal people or affect their ability to benefit from any existing or future constitutional rights for Aboriginal people. This constitutional saving clause is subject to the extinguishment clause, under which Inuit surrender all their "aboriginal claims, rights, title and interests, if any, to lands and waters anywhere within Canada...". However, this clause is read narrowly by Inuit as applying only to previously held land rights, not to any rights of self-government or other parts of the Inuit constitutional agenda, such as protections for Inuit language and culture.

In the Western Arctic, Inuvialuit have pursued their self-government objectives for more than twenty years. The original Nunavut

land claim proposal included the Western Arctic (the Nunavut final agreement does not) and provided for a Western Arctic Regional Municipality (WARM) in addition to the proposal for a Nunavut Territorial Government. The Inuvialuit proposal for a regional government was not addressed in the final land claims agreement for the Western Arctic (the Inuvialuit Final Agreement, 14 June 1984), but section 4(3) of the Inuvialuit Final Agreement provides that Inuvialuit shall not be treated less favourably than any other Aboriginal group with respect to governmental powers and authority.

The Inuvialuit Regional Corporation (IRC) clearly regards the issue of self-government as outstanding and unfinished business for Inuit of the Western Arctic and wishes to have a "functional regime of regional and community government for the Western Arctic...well before division of the Northwest Territories takes place".⁹⁶

The extinguishment provisions of the IFA and the federal ratifying legislation⁹⁷ call for the extinguishment of "all" Aboriginal claims "in and to" the settlement area. Like the similar provisions in the Nunavut Land Claim Agreement, these are read narrowly by Inuit as applying only to land rights of Inuit as they existed before the ratifying legislation. (In exchange for extinguishment, Inuit receive various benefits under the agreements, including cash compensation and secure title to Inuit lands within the settlement region.)

A basis for arguing an outstanding right or claim to Aboriginal self-government rights in the Western Arctic can be found in section 4(3) of the IFA, which commits the federal government to treat the Inuvialuit no less favourably than other Aboriginal people when public institutions or governments are restructured, and in section 3(6), which preserves the right of Inuvialuit to benefit from any future constitutional rights and preserves their identity as an Aboriginal people of Canada.⁹⁸

The IRC has stated the Inuvialuit preference for a public (or non-ethnic) form of government at the regional level and wishes to negotiate this with the federal government. Community self-government within the region may be ethnic or non-ethnic. The IRC envisages the territorial government participating as a member of the Canadian delegation. The regional government the IRC envisages would be called the Western Arctic District Government, and

its nature and status will be determined by the Self-Government agreement to be negotiated, with federal legislation to give force and effect to the Agreement and to the self-government structures. At the later point of division of the Northwest Territories, the intended governmental structures would also be reflected in the new constitution for the so-called Western Territory.⁹⁹

The IRC views its proposal for a Western Arctic District Government as a practical means of acquiring law-making powers. The March 1993 IRC proposal states that "self-government means a devolution of legislative powers and jurisdictional authority, not just an administrative role."¹⁰⁰ The joint Gwich'in and Inuvialuit proposal later the same year (1993) is largely consistent with the March 1993 Inuvialuit proposal.

The March 1993 IRC proposal includes a draft Inuvialuit Self-Government Agreement that addresses a wide range of matters determining the structure, powers and functioning of the proposed government. The basic objectives of the proposed agreement, set out below, are clearly influenced by provisions of the Charlottetown Accord:

- (a) to recognize and affirm that the Inuvialuit have the inherent right of self-government within the Western Arctic Region of Canada;
- (b) to enable the Inuvialuit to safeguard and develop the Inuvialuit language, culture, economy, identity, institutions and traditions;

- (c) to enable the Inuvialuit to develop, maintain and strengthen the Inuvialuit relationship with their lands, water and environment, so as to determine and control their development as a people according to their own values and priorities and to ensure the integrity of their society;
- (d) to further the principles and goals set forth in the Inuvialuit Final Agreement;
- (e) to bring greater equity and efficiency with respect to government in the Western Arctic Region through devolution of governmental powers and authority; and
- (f) to provide for bodies or institutions of self-government that are open to the participation of all residents of the Western Arctic Region.¹⁰¹

The following legislative powers are proposed for the Western Arctic District Council:

- (a) community government relations and the co-ordination of local government activities;
- (b) culture, recreation and language;
- (c) district utilities;
- (d) economic development and northern benefits programs;
- (e) education;
- (f) issuance of mineral rights;
- (g) land use planning and zoning;
- (h) lotteries and gambling casinos;
- (i) municipal services;
- (j) district parks;
- (k) housing;
- (l) public safety services;
- (m) tourism;
- (n) wildlife management;
- (o) ancillary matters; and
- (p) other subjects as may be determined from time to time.¹⁰²

In Northern Quebec, effective self-government arrangements for Nunavik (the region of Quebec lying north of the 55th parallel) was one of the objectives of the James Bay and Northern Quebec Agreement (JBNQA). While this objective has been met to a limited degree under the JBNQA through the establishment of numerous public institutions such as school boards and health boards controlled by Inuit, "it soon became

evident that Nunavik was lacking overall powers and structure required for effective self-government" and that "the region's decision making powers are fragmented — they are divided up among autonomous organizations which often work independently of each other".¹⁰³ A brief presented by Quebec Inuit to the Commission on the Political and Constitutional Future of Quebec states the need for self-government arrangements in Northern Quebec as follows:

Inuit want self-government arrangements in Nunavik which they can rely on to set their priorities, determine their future, and ensure the survival and growth of their culture and society.¹⁰⁴

Inuit in Northern Quebec have also chosen a non-ethnic form of government and sought negotiations toward this end with the province of Quebec. As a result of a 1987 referendum held in the region, the Nunavik Constitutional Committee was formed to pursue community consultations on the matter and eventually to draft a proposed Constitution of Nunavik. Negotiations with Quebec began in January 1991 but were suspended pending the outcome of the constitutional reform discussions. In February 1993, Inuit tabled a document on "a possible political accord to provide for Nunavik self-government". Quebec appointed a special negotiator, Francis Fox, in May 1994, and a framework agreement to govern the negotiations was reached in July 1994 between the Inuit of Nunavik and the government of Quebec. The preamble of the framework agreement says the Quebec government is committed to negotiating a form of self-government for the residents of Nunavik. The purpose of the framework agreement is to promote efficient negotiations to establish a Nunavik Assembly and government. The purpose of the non-ethnic Nunavik Assembly and government includes providing "Inuit and other residents north of the 55th parallel with a strong and effective autonomous government" and "a framework for devolving over time powers and resources to Nunavik".¹⁰⁵

The first draft of the constitution¹⁰⁶ proposed by Inuit calls for a Nunavik Assembly of at least 20 members with the legislative powers in all areas necessary to administer the Nunavik region effectively, including

- lands
- education
- environment
- renewable and non-renewable resources
- health and social services
- employment and training
- public works and infrastructure
- taxation and revenue
- justice
- language and culture
- transportation and communication
- recreation
- offshore areas
- external relations

This new government would have its powers recognized or devolved from the Quebec National Assembly (and perhaps the federal government as well) but "arrangements for the establishment of the Nunavik Assembly and Government shall respect the authority of the Quebec National Assembly".¹⁰⁷

The Nunavik proposal also contemplates an executive branch (cabinet) and a judiciary system and the application of the *Canadian Charter of Rights and Freedoms*, the *Quebec Charter of Human Rights and Freedoms* as well as a Charter of Rights and Freedoms for Nunavik residents. The Nunavik Charter would "protect and promote special additional rights and freedoms for residents of Nunavik and in particular for Inuit as a distinct people and first founders of Nunavik".¹⁰⁸ Inuktitut, English and French would be the official languages of Nunavik.

The Labrador Inuit Association has considered a number of self-government models in numerous self-government workshops over

the years. In 1987 some of the self-government options under consideration included a regional government based on municipal units, a regional government based on federal enclaves like those established under the *Cree-Naskapi (of Quebec) Act*, a system of separate, issue-specific institutions of self-government, and a territorial form of government for Northern Labrador.¹⁰⁹ In 1993, the Labrador Inuit Association submitted a proposed agreement in principle for the Labrador Inuit comprehensive land claim that included a proposal for a non-ethnic form of government. However, the choice between an ethnic and a non-ethnic government has continued to be debated and as of this writing had not been finally determined.

The Labrador Inuit Association (LIA) has demonstrated a strong interest in recognizing Inuit customary law as part of any land rights agreement in Northern Labrador. Consistent with this, the inherent right of self-government and the right of self-determination have been important concepts underlying the LIA approach to self-government. Labrador Inuit customary law is regarded as fundamental to self-government and land claims and to the identity of Labrador Inuit and has been described as "the primary means through which Inuit have traditionally exercised their rights of self-government."¹¹⁰ LIA expects to have Inuit customary law recognized on "Labrador Inuit lands" and throughout the settlement area.

LIA also believes customary law to be a central issue in Labrador Inuit self-government. Within the context of self-government LIA is examining a range of questions about how customary law should be applied and through what institutions or authorities. The critical question is whether, and to what degree, institutions of self-government and self-government arrangements should be shaped by Labrador Inuit customs and traditions and whether those institutions will have the power and authority to establish rules and laws that will supersede and replace Labrador Inuit customary law.¹¹¹

Further,

A critically important issue is the relationship between criminal law and the administration of criminal law and Labrador Inuit customary law. Here the primary issues under consideration are local control over policing and the role, if any, to be played by the AngajukKauKatiget (elders) in relation to family and the administration of justice.¹¹²

Although the federal government is seen as having primary responsibility for addressing Inuit land and self-government rights, the involvement of the provincial government is regarded as necessary in resolving the many issues respecting land entitlement and self-government in Northern Labrador.

Inuit and the Fiduciary Duty

Inuit maintain that the federal Crown has a specific relationship with Inuit as a people and a fiduciary duty to Inuit. Inuit have also indicated that they see a continuing responsibility of the Crown attached to any legislative authority exercised over Inuit:

So long as the federal and provincial governments exercise any jurisdiction over aboriginal people, those governments have a special responsibility to exercise that authority in the best interests of aboriginal peoples.¹¹³

In interviews, Inuit leaders have indicated very strong views that the federal fiduciary duty will remain so long as there are Inuit in Canada, and that this duty cannot and should not be diminished or altered without Inuit consent. Considerable concern was expressed by Inuit leaders about federal attempts to offload responsibilities to provincial and territorial governments. Provincial governments were seen as having a role in providing programs and services as they do to other citizens, but this was not generally seen as fulfilling a provincial fiduciary duty. Only one leader could contemplate situations where provincial governments could hold a fiduciary duty to Aboriginal

peoples. Inuit appear to view their relationship with the Crown primarily as a relationship with the federal Crown, particularly when dealing with the fiduciary duty.

The failure of Canada to obtain Inuit consent to the transfer of federal territory to Quebec and to the establishment of territorial and provincial government authority in Inuit homelands has been described as a violation of Canada's trust responsibility to Inuit and as a failure to respect the bilateral nation-to-nation relationship recognized by the *Royal Proclamation of 1763*. In 1980 Eric Tagoona, co-chairman of the Inuit Committee on National Issues, made the following statement on behalf of the ICNI:

The bilateral nature of our relations with government as witnessed in the Royal Proclamation, has gradually deteriorated in Canada over the past 100 years. Although the Royal Proclamation has never been repealed, unilateral legislation from time to time on the part of the Canadian Parliament has served to violate the essential principles of the Proclamation.

Despite Canada's trust responsibility in regard to Inuit, we were not consulted when Canada transferred jurisdiction over part of our homeland to Quebec by virtue of the Quebec Boundaries Extension Acts of 1912. Nor were we allowed to participate in the formation of a system of government in the Northwest Territories under the Northwest Territories Act. Nor we were consulted when Labrador joined Canada in 1949. In addition, we were denied the right to vote in federal elections until July 1, 1960. This legislative encroachment upon our capacity to predetermine our social order was compounded by various government policies that impeded Inuit local control.¹¹⁴

Inuit maintain that the federal government's fiduciary duty includes an obligation to respect the fundamental human rights of Inuit, including their right of self-determination.¹¹⁵ For Inuit, this means doing everything possible to help realize the regional self-government objectives of Inuit in Canada as well as the necessary constitutional reforms described in previous sections of this paper. Recent initiatives such as the agreement to establish Nunavut and the self-government

negotiations in Quebec and the Western Arctic represent the beginning of such a process.

PART 2 — REPORT OF INTERVIEWS WITH INUIT LEADERS ON SELF-GOVERNMENT AND TREATY RIGHTS ISSUES

Members of the board of Inuit Tapirisat of Canada (ITC) were approached to answer a number of questions concerning Inuit views of self-government and treaty rights. Six members of the ITC board were available for interviews — Rosemarie Kuptana, Chesley Andersen, Paul Quassa, Senator Charlie Watt, Tony Andersen and Mary May-Simon. These interviews were intended to solicit responses that would supplement or clarify positions taken by ITC in the formal presentations and submissions described in the first part of this report. There were five major areas of inquiry:

1. Inuit views of the *Canadian Charter of Rights and Freedoms*;
2. Inuit identity and Canadian citizenship;
3. the fiduciary duty of the federal Crown;
4. constitutional protection of self-government agreements; and
5. the nature of the inherent right of self-government.

The responses are not the official views of ITC but the viewpoints of the respondents who kindly agreed to be interviewed. To allow ITC to continue to develop formal positions on these issues in its own time, the following comments are not attributed to individuals.

1. The *Canadian Charter of Rights and Freedoms*

The Question:

Inuit leaders were asked to describe in general terms Inuit attitudes regarding the application of the *Canadian Charter of Rights and Freedoms* to Inuit-controlled governments. Leaders were also asked

whether it was accurate to characterize ITC's position on the *Canadian Charter of Rights and Freedoms* as ambivalent and whether Inuit traditional values are regarded as in any way consistent with Charter values (for example, the high value placed on respect for personal autonomy within Inuit culture).

The Answers:

- (a) ITC is not ambivalent about applying the Charter to Inuit-controlled governments. ITC accepts the application of the Charter of Rights and Freedoms but there has not been a lot of discussion to reach this conclusion. In a general way, Inuit have a positive response to individual rights. Inuit see the Charter applying in terms of having the same rights as other Canadians, without precluding our right to pursue the collective rights of peoples, that is, what applies to other peoples in terms of human rights. To the extent Inuit accept the Charter it is because we've been exposed to it as Canadians. We see it as an instrument that can protect certain parts of our culture. On the other hand, the degree of accordance between Inuit traditional values and the Charter is an unanswered question. We can anticipate questions if not actual conflicts. This raises the issue of whose Charter and whose Constitution is it, and whether Inuit are going to have a say in what our fundamental freedoms are. There will of course be differences. Inuit culture is evolving and Inuit will decide collectively what the cultural norms of the day are. There are Inuit traditions, traditional values and social sanctions that are still applied in contemporary Inuit society, for example, exile (social ostracism), arranged marriages, adoption. Inuit tend to be very practical and look for protections for things that sustain life

such as language and culture. Equality may not mean sameness of treatment. With respect to women's rights, I expect that Inuit-controlled governments will have to deal with traditional Inuit values. On the other hand, our social behaviour has changed to meet the world around us. There is a clash of cultures and it's us [Inuit] trying to fit into Canadian power and value systems rather than doing it the other way around. This is evident in the area of language rights and broadcasting for example. We consider the Inuit language as important as English and French but we don't receive the same level of support financially or legislatively. ('where numbers warrant' criteria have not worked in our favour). I look at the Canadian Charter and the Constitution as a tool that could potentially protect us as a people.

- (b) In principle, Inuit accept the Charter. It is a matter of working out the details. On the other hand, Inuit tend to be very accommodating. If a negative effect is not apparent, there will be a tendency to accept. Inuit acceptance of the Charter is a mixture of the two factors — affinity with Inuit traditional values and acceptance of the Charter as a part of the Constitution and [therefore] as a part of Canadian society. [With respect to sexual equality], certain components of Inuit society depend upon women, and certain other components depend upon men. Men and women have different but equal roles. Inuit are quite strong on individual rights but without collective rights, it is very hard to have individual rights. It was clear in our constitutional discussions that there has to be a balance between individual and collective rights. Inuit acceptance of the Charter is a part of a modern transition to accept laws that are considered to advance

one's rights. Inuit have talked about having our own Charter, one that is more culturally appropriate.

- (c) Inuit are open to Charter in the sense of participating and having something acceptable to us. The Charter is consistent with Inuit values, and for that reason in my region it is so acceptable.
- (d) During the last constitutional reform process, a lengthy debate about the Charter took place. The ITC board agreed that the Charter should apply — provided the rights of the collectivity would be protected. Essentially, Inuit do accept the Charter. ITC board members expressed the view that there is a need for individual protections under any government, and because some traditional values would conflict with individual rights.
- (e) Many Inuit would not be familiar with the Charter and assume it is already there. They would accept the Charter automatically. There is some consistency with Inuit values. However, there is no concept of rights in Inuit tradition but they were always there, part of our mentality even though they were never written.
- (f) Inuit need some instrument to protect ourselves from ourselves, to deal with conflicts between collective rights and individual rights within Inuit communities. The *Canadian Charter of Rights and Freedoms* attempts to protect individual rights and is good as an interim measure until Inuit have more fully reflected upon what kind of individual human rights protections we require. We need our own Charter and this may conflict with the Canadian Charter. An Inuit Charter may expand upon the protections offered by the Canadian Charter or we may need exemptions. I cannot really say that the Canadian Charter is consistent with Inuit traditional values. Our acceptance of it is more a practical solution, in order to live under one umbrella. We have to ask ourselves whether it is broad enough to accommodate everyone.

2. Inuit Identity and Canadian Citizenship

The Question:

On several occasions, Inuit leaders have stated that Inuit identify as Canadian citizens. Leaders were asked if they could describe how Inuit identify as Inuit and as Canadian citizens.

The Answers:

- (a) To say that Inuit identify as Canadian citizens is more a practical statement than a positive reaction to Canadian citizenship. It is an acceptance of reality, of not being able to exercise your right of self-determination as a sovereign nation. The question is how to identify as a Canadian while ensuring our language and culture survives. In terms of my own identity, I identify first as an Inuk, secondly as being part of a larger Inuit nation (that includes Inuit living in other countries) and third, as a citizen of Canada. It goes back to the question of how to survive. It's a matter of survival. This is our original homeland. We have no other place for our language and culture to flourish and we must have protections for our language and culture here.
- (b) Inuit identify with this country as their homeland, that in English is called Canada — so if you want to call us Canadians, o.k. Our land was called Nunavut before Europeans arrived. Although we may not always agree or identify with Canadian law, Inuit are proud to be Canadians — it is an attachment to the country that has always been one's home. Other people came to it and now it is called Canada. If you live in a country from time immemorial, you belong in that place. There is not necessarily a conflict between Inuit identity and Canadian identity. The attitude of Inuit is non-confrontational. Our regions are less given to

resource exploitation and physical occupation. There are fewer competing interests except for resources other than land. Inuit attitudes have helped our rights in many ways. The key question now is how Inuit can be part of the larger society and retain our identity as Inuit.

- (c) Inuit do identify as Canadian citizens because of our connection to other Canadians in the country and our strong connection to other parts of Canada where Inuit live. We identify as Inuit as a group of people that goes across Canada. However I don't know what older Inuit from Labrador think who were born before Newfoundland joined Confederation. Many Canadian institutions may be consistent with Inuit values. In terms of Inuit identity, we consider ourselves northern Labradorian [Inuit] first, and secondly as Canadian. We don't identify as citizens of Newfoundland.
- (d) There is a realization that we live in a country that is larger than the Inuit nation — Canada — and Inuit like living in a country where they can express their own views and retain our identity as Inuit. Inuit feel we can do that in Canada.
- (e) When I was younger I questioned why we say we're Canadians when we were here before Canada was created. However, because we pay taxes, we are true Canadians and we've always stated that we want to be treated like other Canadians and that was the purpose of land claims — to have economic opportunities and to have an equal say. Then we can be true Canadians. If we are to be true Canadians, we have to be a part of Canada. In the early days we never thought of ourselves as Canadians. Land claims are a means of becoming, and being accepted as, Canadians. Before claims agreements, Canada just meant the

RCMP and so on. It was alien. The process of negotiating land claims agreements has been a process of inclusion.

- (f) Our acceptance of Canadian citizenship is more a recognition that it is late in the day to say anything else. We also want to go forward to finding solutions rather than moving apart, to move toward partnership and toward recognizing what the power of the majority means to the minority. Inuit are here to stay and we must be allowed the space to live within the umbrella of Canada.

3. The Fiduciary Duty of the Federal Crown

The Question:

The Supreme Court of Canada has stated that the federal government has a fiduciary duty toward Aboriginal peoples in Canada, arising from a variety of sources including the federal government's law-making power over Aboriginal peoples under section 91(24) of the *Constitution Act, 1867*. Inuit leaders were asked how they view the future of the federal fiduciary duty and its relationship to Inuit self-government objectives. In what manner and to what extent should or would the federal fiduciary duty be limited? Would the fiduciary duty of governments lessen to the extent Aboriginal peoples were permitted to reassert law-making authority over their people? Do provincial governments hold a fiduciary duty in respect to any law-making authority they hold over Aboriginal people?

The Answers:

- (a) The federal government is trying to offload so many of its duties to Aboriginal peoples on to provincial governments. The fiduciary duty lies solely with the federal government and Inuit

wouldn't want any province or territory to acquire that responsibility.

- (b) I am concerned that the fiduciary duty with respect to Inuit living in the provinces is being eroded by a number of things. The overall responsibility of the federal government in respect to Inuit in Labrador and Quebec is being affected — it's just not clear how yet. Historically, section 91(24) of the *Constitution Act, 1867* gave the federal government the fiduciary duty to Aboriginal peoples. However, there may be circumstances where a provincial government has a fiduciary duty to Aboriginal people, for example, a Davis Inlet type of situation. The fiduciary duty as a general duty must always exist as a duty of the Crown. Aboriginal governments should be able to exercise a relationship with other levels of government. Quebec has tried to insist on provincial-Inuit negotiations on self-government. A self-government agreement resulting from such negotiations would not be constitutionally protected and could be changed by the provincial assembly. Inuit-controlled governments would want to have a relationship with other governments, for example, Greenland.
- (c) I could see the duty decreasing with realization of self-government. Given the opportunity to govern ourselves, the federal fiduciary could diminish but if we are to remain part of the federation, it could never completely disappear. It is not at all desirable that provincial governments have any fiduciary duty in respect of Inuit. In fact, this would be very undesirable.
- (d) Certain aspects of the duty should be there but in terms of self-government institutions there may be a need for institutions to take on the responsibility for running them and financing a portion of them if able to do so. However, in order to do that,

economic opportunities need to be completely available, and [self-government institutions] need the ability to tax. Provincial governments do not necessarily hold a fiduciary duty to Aboriginal people but they do have a duty to supply services such as education and health to residents of the region. That shouldn't be just a federal responsibility.

- (e) I believe the federal fiduciary duty has to be there indefinitely. It has always to be there. It has been there since 1867. It would not diminish with the realization of self-government rights, just as it did not diminish when Aboriginal rights were recognized in the Constitution. The federal fiduciary duty can't and shouldn't diminish. Many programs, funds and services have been cut because the federal government is handing over its fiduciary duty to territorial governments. The fiduciary duty shouldn't be handed over to provincial or territorial governments, because this will diminish our rights. The federal fiduciary duty cannot be delegated. The federal government can devolve powers and programs but not the fiduciary duty.
- (f) Regardless of where they are, as long as Aboriginal people live in Canada, Canada cannot say the federal government does not have a responsibility. The federal government has been trying to escape its fiduciary responsibility but it cannot do so totally. Provincial governments may assume responsibility for some areas in respect of Aboriginal peoples with the consent of Aboriginal people. For example, under the James Bay and Northern Quebec Agreement, the provincial government acquired responsibilities that were previously federal. However, despite the transfer of responsibilities to the provinces, the federal government always has a fiduciary duty. For example, the federal minister of Indian affairs has to report to Parliament on

the standing of the James Bay Agreement periodically, that is, to monitor the execution of the James Bay and Northern Quebec Agreement.

4. Constitutional Protection of Self-Government Agreements

The Question:

ITC has made known its view through several constitutional reform processes and in numerous public statements that self-government agreements like land claims agreements should be recognized by governments as treaties under section 35(1) of the *Constitution Act, 1982*. Why is constitutional protection of self-government agreements and land claims agreements important? If each Inuit region negotiated a constitutionally protected self-government agreement, would there still be a need for a constitutional provision recognizing and entrenching the inherent right of self-government?

The Answers:

- (a) Self-government agreements must receive constitutional protection because we have to be reflected in the highest law of the country and to ensure our rights are protected. If these agreements were not constitutionalized, our fate would be left to the governments and the political will of the governments in power. Irrespective of whether or not there are constitutionally protected self-government agreements, there is a need for a stand-alone provision entrenching the inherent right of self-government, a provision recognizing this fundamental human right of Inuit. We will be a third order of government.
- (b) Land claims agreements have provided an opportunity to have a better relationship with the government of Quebec by providing greater control over education and other areas and more secure

land ownership. Land claims agreements do not provide a system of government, only co-management in resource development. Non-renewable resources have not been part of resource-sharing. Under land claims agreements, we do exercise more control but they are not self-government arrangements. Land claims negotiations need not be separated from self-government negotiations. Both negotiations are complex but self-government is more complex. Inuit [in Northern Quebec] probably would have liked to negotiate self-government but probably would not have been able to negotiate within the two years it took to negotiate the JBNQA. Once land claims agreements are settled, the impetus to pursue self-government lessens (in part because of the demands of implementing the land claims agreement). Land claims provide more power but not necessarily autonomy. Constitutional protection of self-government agreements is required because it provides the most protection. The Constitution is not a law that is changed easily. Protection of the highest order is needed for self-government and land claims agreements. Self-government created by provincial legislation can be changed by ordinary legislation. We could argue that the inherent right of self-government is already in section 35. If we negotiated agreements that recognized the inherent right of self-government, we might not need an explicit provision. However, Inuit can not accept any implication that any self-government powers Inuit exercise stem from anything other than the right that existed before the Canadian Constitution.

- (c) Constitutional protection of self-government agreements is important because of our fear that if not, the provinces, through taking away federal responsibilities, could become more and more responsible for Aboriginal people and our rights would

become further eroded. It is also important because we are a distinct people in this country and governments do change as well as their attitudes, and constitutional protection is needed to ensure we remain distinct.

- (d) Through the experience of negotiation and implementation of our rights, Aboriginal people have come to realize that without constitutional protection, our rights can be overturned — governments change and times change. But rights should not change. We don't want to go back to the old days of having treaties not written up — or written by one side. If we had self-government agreements protected under the Constitution and we can argue the inherent right is already in the Constitution under section 35, we may not need a separate provision.
- (e) Constitutional protection of self-government agreements, like land claims agreements is needed. If not, our rights could vanish. There is less chance governments will attempt to erode our rights if they have constitutional protection and our rights could not be eroded through ordinary legislation. Governments would have to monitor the legislation they pass for its effect on our rights. With respect to the need for a stand-alone provision in the Constitution recognizing the inherent right of self-government, the right to self-government, including the right to govern other people [non-Inuit], should have been in the Constitution from the beginning.

5. The Nature of the Inherent Right of Self-Government

The Question:

Do Inuit regard the inherent right of self-government as an Aboriginal right, a fundamental human right, or as both?

The Answers:

- (a) The inherent right is a fundamental human right — a human right that we've always had and always will have. I have a lot of doubts about the way Aboriginal rights are defined in this country. It depends on who you are talking to and who is making the decisions. Often those making the decisions, their ideas don't conform with our ideas of our fundamental human rights. Human rights are one thing and Aboriginal rights are another.
- (b) There is a distinction between Aboriginal rights and human rights. Self-government is both. The source of the right is a human right and it is an Aboriginal right because we're talking about exercising a right of different peoples. All fundamental human rights are tied to Aboriginal rights.
- (c) It's important that the self-government agreements include recognition of the inherent right of self-government.
- (d) The inherent right of self-government is primarily an Aboriginal right but has also become a human right and they now match one another quite completely.
- (e) Self-government falls under that box of Aboriginal rights under section 35. The concept [of being self-governing] has always been with us. Aboriginal rights are not defined [under section 35] and self-government is part of it. Everything is included under the concept of Aboriginal rights including self-government. An Aboriginal right is an inherent right and therefore self-government is included.
- (f) The interpretation of the inherent right of self-government varies depending on who you talk to. However, everyone has it in principle. At a practical level, there may be difficulties in

exercising it beyond a reserve community in southern regions. In the case of Northern Quebec, my inherent right has never been on the [negotiating] table and it includes the right to govern people who are not my race. The inherent right is not necessarily an Aboriginal right. It is more of a fundamental right, a human right, a right of all peoples.

CONCLUSION

There is ample evidence that European colonization of North America and the creation of new states such as Canada by settler populations have taken place at the expense of the rights of self-determination of Indigenous peoples. While Inuit and other First Nations were often willing to share their land with newcomers, this generosity was used against Indigenous peoples to deny their rights of ownership and self-government by the newly created states.

Inuit self-government rights have been expressed by Inuit organizations in human rights terms by asserting the political and legal status of Inuit as a people with a right of self-determination. The inherent right of self-government is regarded as an aspect of the right of self-determination and as an Aboriginal right within the framework of Canadian common law. Although Inuit self-government rights have been asserted within an Aboriginal rights framework, there is significant concern about the limiting aspects of the common law. The international human rights framework is looked upon as a potential standard against which to measure the protection of the equal rights of Indigenous peoples under Canadian common law.

Constitutional reform measures explicitly addressing the question of self-government are considered necessary and desirable, particularly given the uncertainty about whether section 35 of the *Constitution Act*,

1982 will be interpreted by the courts as guaranteeing the inherent right of self-government.

While the right of self-determination occupies a central place in Inuit political aspirations, there is a desire to exercise this right within Canadian federalism and a preference in most regions for non-racially based forms of self-government with territorial boundaries that ensure that Inuit are the majority population (e.g., Nunavut). These so-called non-ethnic governments would nevertheless provide protections for Inuit language and culture and in some cases may provide mechanisms to guarantee Inuit representation. In some regions, there is a continuing interest in ethnic forms of government at the community level and in customary law.

Self-government agreements will be negotiated at the regional level in order to deal with the jurisdictional realities of Canada as a federal state. Treaty making through the negotiation of land claims settlements and constitutionally protected regional self-government agreements is regarded as essential to ensuring the full and equal participation of Inuit in Canadian society. Constitutional protection of self-government agreements would provide a greater degree of security for the powers recognized under federal or provincial legislation. In this sense, the powers exercised by new self-government structures would be devolved rather than delegated and would be consistent with a recognition of the inherent right of self-government.

There is a high level of consensus among Inuit in all regions on the fundamental legal principles that should be reflected in the Canadian Constitution. This is evidenced by the strong Inuit support for the Charlottetown Accord in the referendum and by the consistency in Inuit positions over the past 20 years. Just as important, detailed proposals for regional or territorial self-government structures have been proposed for the Western Arctic, Nunavut, Nunavik and Northern Labrador by

regional Inuit organizations. Many years of preparations and consultations at the community level have led to this result. Constitutional reform is seen generally as a necessary complement to the self-government arrangements being negotiated and implemented at the regional level now.

The relationship with the federal Crown is regarded as the primary one, and the Crown's fiduciary duty to Aboriginal peoples is considered a permanent fixture of Canada's constitutional framework. Nevertheless, Inuit in Quebec and Newfoundland have accepted the need to include provincial governments in self-government negotiations because of provincial jurisdiction in areas important to Inuit such as lands and resources.

Inuit in Canada have a strong sense of their common identity and exist as a people within Canada and within the circumpolar world. There is a strong attachment to Inuit language, culture, traditions, and their traditional lands. Inuit regard themselves as a practical and adaptable people, who value negotiation as a means of conflict resolution and who recognize the interdependence of peoples. Inuit accept the existence of Canada but expect an opportunity to negotiate their place in the federation. A reluctant acceptance of Canadian citizenship appears related to feelings of exclusion because of the failure of Canadian society fully to address the status of Inuit as a people with fundamental rights.

Inuit aspirations for new self-government structures in the North do not represent a return to the past or a rejection of the past. Inuit simply wish to determine their own lives, to continue to adapt to a rapidly changing world, as all peoples must. Inuit seek new self-government structures that will reflect Inuit identity while living in a federal state. The willingness of Inuit to work within a federal state, renewed and reformed by self-government agreements, demonstrates

Inuit adaptability and pragmatism — attributes highly valued by Inuit. The interest in non-ethnic forms of government and in international and domestic human rights norms shows that Inuit acknowledge the interdependence of peoples and the value of individual rights. Recognition of the inherent right of self-government within the Canadian Constitution and the right of self-determination under international human rights law will allow Inuit the freedom to be themselves within the larger Canadian and international communities of interdependent and equal peoples. The positions of Inuit organizations on self-government issues show how individual and collective rights can be reconciled within a human rights analysis and how the notion of equality of all peoples is as important as, and is related to, the equality of individuals.

NOTES

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3. R.S.C. 1985, Vol. XII, Appendix II, Doc. No. 5; *In re Eskimos* [1939] S.C.R. 104.
4. R.S.C. 1985, C. I-5.
5. Alootook Ipellie, "The Colonization of the Arctic", in *Indigena: Contemporary Native Perspectives*, ed. McMaster and Martin (Vancouver/Toronto: Douglas & McIntyre/Canadian Museum of Civilization, 1992), pp. 39-57.
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7. Nungak, "Fundamental Values", cited in note 1, pp. 87-88.
8. David Maybury-Lewis, *Millennium: tribal wisdom and the modern world* (New York: Viking Penguin, 1992), pp. xiii-xiv.
9. Pauktuutit, *The Inuit Way*, cited in note 6, p. 6.
10. Nungak, "Fundamental Values", cited in note 1, p. 86.
11. Okalik Egeesiak, Inuit Tapirisat of Canada, personal communication.
12. Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, Issue No. 16, 1 December 1980, pp. 5-6, 28-29.
13. Inuit Circumpolar Conference, *Principles and Elements for Comprehensive Arctic Policy* (Montreal: Centre for Northern Studies and Research, McGill University, 1992), p. 4.
14. Inuit Circumpolar Conference, *Principles*, cited in note 13, p. 7.
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17. Canada, *Minutes of Proceedings*, cited in note 12, pp. 4-18; *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on Senate Reform*, Issue No. 31, 25 October 1983, p. 21.
18. Rosemarie Kuptana, Speaking Notes for the North American Indigenous Nations UN Satellite Meeting, 1 April 1993.
19. Inuit Tapirisat of Canada, Submission to the Royal Commission on Aboriginal Peoples, 31 March 1994.
20. Erica-Irene A. Daes, "Some Considerations on the Rights of Indigenous Peoples to Self-Determination", *Transnational Law & Contemporary Problems* 3/1 (1993); Umozurike Oji Umozurike,

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22. Inuit Tapirisat of Canada, Submission to the Royal Commission, cited in note 19, pp. 44, 8-30.
23. See, for example, the ICNI presentation to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, in Canada, *Minutes of Proceedings*, cited in note 12.
24. See, for example, Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples, 31 March 1994; and Inuit Tapirisat of Canada, Response of the Inuit of Canada to the First Consultation of the Inter-Commission on Human Rights Regarding the Content of a Future Inter-American Legal Instrument on the Rights of Indigenous Peoples, 21 January 1993.
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26. Hector Gros Espiell, *The Right of Self-Determination, Implementation of United Nations Resolutions* (New York: United Nations, 1980), p. 9 (United Nations Document No. E/CN.4/Sub.2/405/Rev.1).
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28. Inuit Tapirisat of Canada, Submission to the Royal Commission, cited in note 19.
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their political status and freely pursue their economic, social and cultural development." The covenants are published in United Nations, *Human Rights: A Compilation of International Instruments*, Volume 1, First Part, Universal Instruments (New York: United Nations, 1993), pp. 8, 20.

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32. Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples, 31 March 1994; and Inuit Circumpolar Conference, *Principles*, cited in note 13.
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40. Michael Ignatieff, *Blood & Belonging: Journeys Into The New Nationalism* (Toronto: Viking, 1993), pp. 3-5.
41. See, for example, Moynihan, *Pandaemonium*, cited in note 38.

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descriptive summary of the joint interest of Inuvialuit and Gwich'in peoples in a regional public government and did not include draft legislation. The draft legislation of November 1993 has not been approved yet by either the Gwich'in or the federal government. Negotiations between the federal government, the Gwich'in and the Inuvialuit on a specific form of regional public government for the Western Arctic were due to begin in September 1994.

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106. Nunavik Constitutional Committee, *Constitution of Nunavik*.
107. Nunavik Assembly and Government Negotiation Framework Agreement, cited in note 105.
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112. Inuit Tapirisat of Canada, Submission to the Royal Commission, cited in note 19.
113. Inuit Tapirisat of Canada, Discussion Paper, cited in note 78.
114. Canada, *Minutes of Proceedings*, cited in note 12, p. 6.
115. Inuit Tapirisat of Canada, Submission to the Royal Commission, cited in note 19, pp. 54-57.

**DO THE METIS FALL WITHIN
SECTION 91(24) OF THE *CONSTITUTION ACT, 1867?***

by Bradford W. Morse and John Giokas

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EXECUTIVE SUMMARY

This paper examines the question of whether Metis are included in section 91(24) of the *Constitution Act, 1867*, drawing on existing literature and jurisprudence, as well as historical and political aspects of the relationship between the Metis and Canadian governments. It addresses definitions of Metis; federal policy, legislation, academic commentary and judicial decisions related to the pre-1982 constitutional status of the Metis; more recent federal and provincial constitutional policy, the *Constitution Act, 1982* and subsequent first ministers' conferences; and the potential consequences of the inclusion of Metis within the label 'Indians' for the purpose of section 91(24) of the *Constitution Act, 1867*. The paper argues that it is logical and sensible to consider persons of mixed ancestry of all kinds to be within section 91(24) jurisdiction and that the Metis are included within the fiduciary relationship owed by the Crown to Aboriginal peoples.

Arguments pointing to the inclusion of the Metis within the category of constitutional 'Indians' in section 91(24) are several. First, there is evidence of the inclusion of Metis in the treaty-making process throughout Canadian history, including the adhesion to Treaty 3 by "halfbreeds", and the issues of "half breed" scrip under the *Manitoba Act* of 1870 and later under several of the *Dominion Lands Acts*. A second line of reasoning in favour of federal jurisdiction is the legislative history of inclusion of persons of 'Indian blood' associated with Indian tribes or bands on membership lists as 'Indians' for purposes of the *Indian Act*. A third argument draws upon the wording of the *Manitoba Act*, the *Dominion Lands Act* and other legislation and orders in council implementing the land grant scheme. A fourth thesis for Metis inclusion lies in the modern federal practice of treating Metis as equivalent in constitutional status to the other Aboriginal peoples.

The recognition of Metis as one of the "aboriginal peoples of Canada" in section 35 of the *Constitution Act, 1982* reinforces this federal practice.

Thus, on the balance of historical probabilities, practical convenience, and legal and constitutional logic, and to maintain the honour of the Crown, it is concluded that section 91(24) includes persons of mixed ancestry. It is also more feasible for the federal Crown to exercise the treaty-making power and to discharge constitutional obligations to the Metis. The role of Canadian courts in this regard should be to interpret the Constitution of Canada in such a way as to confirm primary federal responsibility and authority to advance the interests of all Aboriginal peoples as reflected in subsections 35(2) and 91(24).

The ramifications of section 91(24) inclusion are several. It would affirm the constitutional jurisdiction of Parliament to enact legislation in relation to the Metis, and confirm the authority of representatives of the Crown in right of Canada to treat with the Metis as collectivities and to conclude land claims settlements with them. The Department of Indian Affairs and Northern Development would lose one of its primary excuses for refraining from dealing with the Metis. In terms of the federal machinery of government, the role of the Federal Interlocutor for Metis and Non-status Indians and the Privy Council Office might be collapsed into a new Minister of Aboriginal Affairs and a restructured and renamed Department of Indian Affairs.

While this issue to some degree transcends the paper, the question arises, perhaps of equal significance, as to whether inclusion in section 91(24) means that Parliament has not only the capacity, but also an obligation to legislate for the benefit of Metis people. The constitutional entrenchment of Aboriginal and treaty rights in section 35(1) and the judicial articulation of the Crown's fiduciary obligation in

the *Guerin* case suggests that the federal government may be breaching its fiduciary obligations if it refuses to initiate legislation needed to acknowledge the existence of certain Aboriginal peoples or to meet basic economic or social needs. The inclusion of Metis in section 91(24) also means that provinces cannot enact restrictive or negative legislation concerning the Metis specifically. Alberta Metis legislation likely would be readily subject to constitutional challenge.

Recommendations

1. The Royal Commission should formally conclude that Metis are included within the expression 'Indians' within section 91(24).
2. Commissioners should recommend to the Government of Canada that it renew efforts at constitutional reform to build upon and improve the Aboriginal provisions that were contained in the Charlottetown Accord.
3. The Royal Commission should conclude that the Metis are beneficiaries of the fiduciary relationship with the Crown. Further, it should recommend that the federal government respect its fiduciary obligation such that it immediately enter into comprehensive negotiations with representatives of the Metis people.
4. Commissioners should recommend to the federal government that it take immediate action to implement the amendments to the *Alberta Act* sought by the Alberta government and the Alberta Federation of Metis Settlements Associations. This will provide constitutional protection of the land rights of the Metis settlements and will address concerns about the invalidity of the provincial legislation.

DO THE METIS FALL WITHIN
SECTION 91(24) OF THE *CONSTITUTION ACT, 1867*? *

BY BRADFORD W. MORSE AND JOHN GIOKAS

INTRODUCTION

Aboriginal constitutional and legal issues are notoriously complex, and none more so than those surrounding the Metis.¹ There are several reasons for this. In the first place, there is no complete agreement on who the Metis are, although there are many different views, including among Metis people themselves. The term "Metis" has historically been largely associated with the French speaking and Roman Catholic population of Rupert's Land reflecting the results of intermarriage among Indian women and *les Canadiens* along with their descendants. Now it is widely and popularly used to identify a larger and still imprecisely defined group of persons of mixed Indian and non-Indian ancestry,² some of whom also fall within the category of non-status and status Indians as a result of the registration rules under the *Indian Act*.³ At the same time, and especially since the 1960s and the revival of pride in Aboriginal origins, it has also been adopted as a self-description by many people of origins far removed from the Red River in Manitoba. The result is considerable confusion among non-Metis and no small degree of disagreement regarding who the 'real' Metis are by the various groups and political organizations that today attempt to represent Metis interests in different parts of the country. While each group is clearly entitled to decide for itself how it wishes to define its own membership, and any external intrusion in this regard would be thoroughly improper, clear and fundamental disputes exist among Metis people reflecting both different historical experiences and different visions for the future.

Another reason for the complexity of issues surrounding the Metis lies in the conspicuous lack of judicial guidance. There are extremely few cases dealing with Metis rights or status as such. Coupled with this relative absence of caselaw is an inconsistent pattern of colonial, and subsequently federal and provincial, government legislation, policy and practice with respect to the Metis. Consequently, one is obliged to examine legal history and to proceed both from first principles and by way of analogy to a much greater extent than is normally the case with respect to Aboriginal issues. This paucity of jurisprudence linked with inadequate legislative initiatives has opened the debate to a wide range of views that are difficult to reconcile.

A third complicating element lies in the fairly recent renewal of the drive of all Aboriginal peoples for new power-sharing arrangements within the Canadian federation. This has resulted in recognition of the Metis for purposes of the "existing aboriginal and treaty rights" protected in section 35 of the *Constitution Act, 1982* as well as in their inclusion over the last decade in a series of multilateral meetings and first ministers' conferences on constitutional issues affecting them. How this relatively recent renewal of recognition of the existence of another constitutional category of Aboriginal peoples alongside the Indian and Inuit dovetails with the earlier pattern of inconsistent treatment by the governing authorities is a mystery that has yet to be clarified, let alone fully resolved.

Given the foregoing, it is advisable to proceed in stages. Accordingly, it is proposed to divide this overall inquiry into five sections in order to come to grips with the complexities inherent in the issues to be addressed in a more effective and thorough fashion. These five sections are as follows:

1. Who are the Metis?

2. What do federal policy, legislation, academic commentary and judicial decisions indicate regarding the pre-1982 constitutional status of the Metis?
3. What light is shed on Metis issues by more recent federal and provincial constitutional policy, the *Constitution Act, 1982* and the subsequent first ministers' meetings regarding Aboriginal constitutional issues?
4. Are the Metis included within the label "Indians" in the sense of section 91(24) of the *Constitution Act, 1867* and, if so, the more important question becomes, what are the ramifications in 1993?
5. Concluding observations.

Before proceeding further, a general caveat should be noted, namely, that this paper contains a number of generalizations as well as summations of historical development that naturally mask to some degree the complexities and contradictions always evident in the interplay among government policies and historical events embedded in two centuries of Aboriginal-Crown relations. In addition, we must also register our discomfort with the use of the terms 'half-breed' and 'mixed blood' because of their inevitably racist overtones and the derogatory way in which they have been used. We have nonetheless felt compelled to use them with some regularity, as they were common words of the nineteenth and much of the twentieth century developed by the newcomers and imposed upon the descendants of mixed marriages. Furthermore, these expressions were regularly used in legislation and other legal documents as well as serving as a way of distinguishing between the Red River French-speaking Metis and others of mixed ancestry, often to isolate the Metis from non-Aboriginal society. Wherever possible we prefer to use the term 'Metis', as it has become the title of choice of the people concerned and has now been accepted in a non-derogatory manner.

In addition, this paper is limited in several critical senses. It is directed at the relatively narrow question that has been asked of us, namely, whether Metis people are included within section 91(24) of the *Constitution Act, 1867*. We do not address, except in passing, fundamental issues surrounding the land rights of the Metis, their inherent right to self-government and the degree to which they possess other Aboriginal and treaty rights.

Furthermore, this study concentrates its attention upon Canadian domestic law. This is not intended to suggest that international law is not relevant to Metis people, but that the nature of the question under study is one that warrants examination within this narrower context.

We also assess Canadian caselaw for what it says and implies for future judicial rulings without commenting specifically upon its fairness or its inglorious history of bias and prejudice. There is no doubt that Canadian judges, like Canada's politicians, have demonstrated racism and a belief in their own superiority for many generations. As a result, they have ignored the law and legal systems of Aboriginal peoples as well as their opinions and aspirations. The courts and governments have regularly seen section 91(24) as involving jurisdiction 'over' constitutional 'Indians' in the same fashion as they have regarded federal and provincial governments as having jurisdiction over 'inland fisheries' or the 'administration of justice' respectively. There has been little apparent recognition that Aboriginal peoples are in a dramatically different position, let alone seeing them as possessors of a sovereign order of government inside or outside Canada. Pursuing such a critique, although warranted, is beyond the scope of this paper.

WHO ARE THE METIS?

The Many Definitions of Metis

In a relatively recent study of the question of Metis identity by a Metis scholar, Antoine Lussier notes that at a 1981 conference "there appeared to be much confusion regarding the term to be used when discussing the mixed-blood people of nineteenth-century Canada and the northern United States."⁴ After citing the essential portions of seven current definitions of Metis, Lussier observes that in some cases they allow not only for non-status Indians to join Metis organizations, but that in one case even certain non-Aboriginal people are eligible to join (through marriage and subject to associate member status without voting rights or the ability to hold executive office).⁵ Somewhat ironically, one other Metis organization mentioned in his article - a small association with a primarily cultural rather than political focus - requires that its members be French-speaking, Roman Catholic and Metis, but offers no definition of the latter term.⁶ "These new criteria," he remarks, "have not brought the diverse Metis cultural groups together but have more or less separated them."⁷ Recent constitutional history supports Lussier's cogent observation.

Originally formed in 1968 to represent non-status Indian and Metis people, the Native Council of Canada (NCC) has a broad definition of Metis encompassing virtually all persons of mixed Aboriginal and non-Aboriginal blood in Canada, irrespective of historical origins, who self-identify as Metis. While the history of the Metis inhabitants of western Canada provides much of the legal and historical foundation for Metis claims to Aboriginal and treaty rights by the NCC, it does not exhaust them.⁸ Despite the success of the NCC, and particularly through the efforts of its then vice-president and noted Metis leader Harry Daniels, in bringing about the constitutional recognition of the Metis,

however defined, as one of the "aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act, 1982*, the three prairie Metis organizations left to form the Metis National Council (MNC) before the commencement of the 1983 first ministers' conference (FMC). The public rationale for this separation was the desire to ensure direct representation by Metis leaders at the FMC table and to advance positions in favour of the Metis Nation.

The purpose of the MNC was to lobby exclusively for Metis, as opposed to jointly with non-status and off-reserve Indians, issues in the subsequent first ministers' conferences on the Constitution.⁹ The MNC definition of Metis focuses primarily on the descendants of those persons in western Canada to whom the federal government made promises of land in the late 1800s as well as others with Aboriginal blood accepted by successor Metis communities as Metis:

...all persons who can show they are descendants of persons considered Metis under the 1870 *Manitoba Act*; all persons who can show they are descendants of persons considered as Metis under the *Dominion Lands Act* of 1879 and 1883; and all other persons who can produce proof of aboriginal ancestry and who have been accepted as Metis by the Metis community.¹⁰

This definition was slightly revamped for the Metis Nation Accord proposed by the MNC to Canada, the five western-most provinces and the Northwest Territories in 1992 during the Charlottetown Accord process:

(a) "Metis" means an Aboriginal person who self-identifies as Metis, who is distinct from Indian and Inuit and is a descendant of those Metis who received or were entitled to receive land grants and/or scrip under the provisions of the *Manitoba Act 1870*, or the *Dominion Lands Act*, as enacted from time to time.

(b) "Metis Nation" means the community of Metis persons in subsection a) and persons of Aboriginal descent who are accepted by that community.¹¹

This accord has yet to be signed by the government of Canada, the five provinces or the government of the Northwest Territories, however, the MNC is continuing its efforts to obtain formal acceptance of the accord and to move forward with its implementation.

More recently, the MNC proposed a constitution for discussion purposes entitled "Draft Constitution of the Government and People of the Metis Nation" which contained a slightly different formulation for a definition of the Metis, namely,

6.(1) For the purposes of this Constitution "**Metis**" means an Aboriginal person who self-identifies as Metis, who is distinct from Indian and Inuit and

(a) is a descendant of those Metis who received or were entitled to receive land grants and/or scrip under the provisions of the *Manitoba Act, 1870*, or the *Dominion Lands Acts*, as enacted from time to time or

(b) is recognized as a Metis pursuant to laws enacted by the Metis Nation Parliament.

(2) For the purposes of identifying the people of the Metis Nation, the Metis Nation Parliament shall establish laws for the enumeration and registration of the Metis people of Canada.¹²

The issue of how to define Metis is not a new one. Lussier's research into the question uncovers historical evidence of a similar debate more than 100 years ago. A list drawn from an anthropological journal from 1875 reveals nine different categories of persons classifiable as members of the "mixed-blood race".¹³ We know from other historical records that there was some degree of confusion throughout the 1800s and early 1900s concerning who was Indian and who was 'Metis' or 'half-breed' and whether and under what circumstances the latter were also Indians. For example, in the negotiation of the Robinson-Superior and Robinson-Huron treaties in the province of Canada in 1850 it is reported that the chiefs urged the

inclusion in treaty benefits of the 'half-breeds' living among them. The colonial negotiators left it to the chiefs to decide how and to what extent to allow these people to participate.¹⁴

Treaty 3 actually includes "half-breeds" as such "by virtue of their Indian blood "¹⁵ through the Rainy River adhesion of 1875, but this is the only known case of its kind. Adhesions to Treaty 5 between 1876 and 1910 show mixed-blood persons participating as such on an individual basis in that portion of the treaty that extends into Ontario.¹⁶ A Metis group from Moose Factory in Ontario applied to take treaty under Treaty 9 in 1903 but was refused by the federal and provincial Crown negotiators. Nonetheless, many individual mixed-blood persons were included as Indians at that time and through adhesions to Treaty 9 in 1929-30.¹⁷

In the prairies, the situation was different. The francophone Metis and anglophone half-breeds were not only more numerous and militarily cohesive, they were also highly useful if not essential to the Crown as go-betweens and interpreters in the negotiation of the numbered treaties. Apparently a distinction was drawn in the minds of federal negotiators, however, between Metis who farmed in settled communities in the fashion of non-Aboriginal settlers, those who hunted buffalo in the Metis and Indian fashion, and "those who are entirely identified with Indians, living with them and speaking their language."¹⁸ Members of this last group were permitted to take treaty as Indians if they wished and if accepted by the band as members. Those who took treaty were then absorbed within the 'bands' that were later defined as such under the *Indian Act* without any distinction being made between them and other Indians.

Later on the federal government amended the *Indian Act* on several occasions to provide "half-breeds" who had taken treaty with an incentive to self-identify as Metis, take scrip and renounce their treaty

rights and Indian status.¹⁹ But still the confusion continued. Even after these amendments, federal negotiators for Treaty 8 apparently encouraged Metis to take treaty and not scrip, but many Metis resisted this suggestion.²⁰ Until the 1930s so many individuals were still moving back and forth between the 'Indian' and 'half-breed' categories that the Department of Indian Affairs decided it had to investigate the band lists and chose to discharge hundreds of people.²¹ It is also important to realize that many people solely of Indian ancestry, particularly in the northern part of what are now the prairie provinces, chose to take scrip, and thereby became identified as Metis, because of their resistance to the idea of relocating to reserves and their preference to maintain their traditional lifestyle as wildlife harvesters in the bush.

Definition proved difficult even for Metis who were only a few generations removed from the events surrounding President Louis Riel and the Provisional Government in that period of Metis history. The Metis Association of Alberta offered an initial definition to the Ewing Commission (established by the Alberta government in 1934 to look into the health, education and general welfare of the "half-breed" population) as being "anyone with any degree of Indian ancestry who lives the life ordinarily associated with the Metis." Later, the Association expanded the definition to include anyone who self-identified as a Metis and who was accepted by the Metis community as belonging to it.²²

The Ewing Commission, which saw the position of the Metis largely as a social welfare problem for the province, appears to have viewed the Metis as Indian in culture, for the Commission report from 1936 uses the following definition of Metis: "...a person of mixed blood, white and Indian, who lives the life of the ordinary Indian, and includes a non-treaty Indian."²³ In 1938 the *Metis Population Betterment Act* of Alberta simply eliminated the cultural or lifestyle component: "...a

person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in the *Indian Act*".²⁴ In 1940, the Act was amended to impose a rule requiring at least one-quarter Indian blood to qualify as Metis.²⁵

The Ewing Commission's main recommendation was to establish rural Metis settlements akin to reserves, originally and rather ironically called 'colonies'. This is somewhat surprising, given that its mandate was to deal with the problems of the "half-breed population of the province", that is, destitute mixed-blood individual residents throughout the province. One comment on the ambiguity of the treatment of Metis in this regard is worth repeating in its entirety:

Throughout much of the report of the Commission, the uniqueness of the Metis is seen to consist in their poverty, poor health, and lack of education. But of course the Metis were not really unique in these respects...plenty of white settlers shared these debilities [although not as entire communities]....many persons of mixed Indian and white ancestry did not. If the Metis were in fact just ordinary victims of the Depression, they could have been dealt with by the same measures of relief granted to other citizens. That the Commission did not recommend that they be treated in the ordinary way...was at least an implicit recognition that the Metis had something else in common....The Commissioners mention frequently the propensity of the Metis to pursue a common style of life. Only this commonality could justify the recommendation that colonies be established exclusively for Metis. The striking ambiguity here is that the Metis are characterized as both ordinary and special. Clearly, the Commissioners, while steadfastly opposed to granting the Metis special status like that of the Indians, were constrained to admit that the Metis were unique. This ambiguity emerges most clearly in the recommendation, that, while the Metis should not be compelled to join the colonies, they would have no other claim to public assistance if they did not.²⁶

The point is, of course, that the Metis were treated by the province more or less the way Indians would have been treated by the federal government - as a culturally and racially distinct group meriting separate group treatment, including recognition of the need to establish a

distinct land base, as they frequently lived in distinct communities separate from both the Indian reserves and non-Aboriginal settlements. At the same time, they were also being treated like non-status and off-reserve Indians in that the Metis would receive special attention only if they resided within government-approved segregated communities; otherwise they were left to their own devices.

The Phenomenon of Mixed-Blood Populations

It is not immediately apparent why there is so much confusion surrounding this issue. In etymological terms, Metis means simply 'mixed' and is defined as follows in the French dictionary *Le Petit Robert*:²⁷

1. Vx. Qui est mélangé; qui est fait moitié d'une chose, moitié d'une autre.
2. (Metice, 1615; du port. de même orig.) Qui est issu du croisement de races, de variétés différentes dans la même espèce. Dont le père et la mère sont de races différentes.

Once this *croisement* is made, the 'Metisness' is never lost in a sense, as the offspring of subsequent unions will retain this Metis ancestry. Inter-marriage among Metis, however, gives rise to a distinct identity, and thus a new people is born - and some would suggest a new race.

Harrap's Shorter Dictionary (French-English) translates Metis as 'halfcaste' or 'halfbreed'.²⁸ The historical record supports the continuity of these definitions. Both 'Metis' and 'half-breed' were the terms generally in use in the nineteenth century on what was seen by the dominant Euro-Canadians of the east as the western frontier²⁹ to describe persons of mixed Indian and white blood. A number of writers note that 'Metis' was first recorded in use in what is now Manitoba to refer to persons of mixed French-Indian ancestry, while 'half-breed' and

‘country-born’ were reserved for persons of other European (primarily English or Scottish) and Indian ancestry.³⁰

Persons of mixed blood are not restricted to Canada, as attested to by the term *Mestizo*, the Spanish equivalent of Metis that refers to the mixed-blood populations of Central and South America.³¹ In the United States, ‘half-bloods’ have always existed, although not usually as a population separate from Indian bands or tribes as such as in Canada, except to a limited degree in Montana and North Dakota. In fact, over the course of American history, ‘half-bloods’ have often played a leading role in domestic tribal affairs.³²

Moreover, the mixed-blood phenomenon is not limited to the Americas. An initial comparative study of the Canadian west and the southern African colonies reveals the existence of several ‘hybrid’ or ‘Metis’ groups in southern Africa.³³ Although generally known as *Basters*, over time this category of persons came to be differentiated by lifestyle into *Griquas*, *Berganaars* and *Orlams*. The political evolution of these southern African groups shows startling parallels with that of the Metis in the Canadian prairie provinces, including a series of uprisings against the African colonial authorities around the turn of the century.

The term Metis first appears in Canadian historical records mainly with respect to the mixed-blood population of western Canada. These are the people often referred to as the historical Metis Nation connected with the fur trade and the creation of the province of Manitoba in 1869-70. Because of the historical importance of the emergence of a relatively large and distinct Metis population in western Canada in the nineteenth century and the central role played by Louis Riel in two conflicts with the Canadian state, there has been an understandable tendency to associate the term Metis only with the historical Metis Nation, the entry of Manitoba into Confederation, and

the subsequent land distribution under the *Manitoba Act*³⁴ and later the *Dominion Lands Act*³⁵ to 'half-breeds' presumably connected to that Metis Nation.

Some writers and, more important, many Metis people in eastern Canada oppose this traditional western frontier and fur trade-oriented explanation of the origins of the Metis, however, and focus on the presence of mixed-blood persons and groups from the earliest periods of European exploration and colonization.³⁶ The writings of an early French colonist in Acadia refer to the children produced by the interaction between local Mi'kmaq women and French sailors.³⁷ More recent writers note the existence of a separate Metis community in what is now Nova Scotia as early as 1650.³⁸ The presence of sizeable numbers of people of mixed ancestry among the Indians in Ontario and in at least one separate community of their own is also referred to in contemporaneous accounts of the nineteenth-century treaties in that province.³⁹ The existence of a distinct Aboriginal population in southern Labrador that has chosen quite explicitly and consciously to identify itself as Metis and to form the Labrador Metis Association in recent years to advance their political and legal interests, including pursuing a comprehensive land claim, is further indication not only of historical but also of contemporary realities of "Metisness" far removed from the Red River settlements and the territory of the Metis Nation.

Even in the frontier western provinces and the northern territories there are communities of people of mixed ancestry who call themselves Metis yet have no connection with the historical Metis Nation of early Manitoba and Saskatchewan. Many of these persons took treaty as members of Indian bands during the negotiation of treaties 5, 8, 10 and 11, or received scrip or were eligible to receive scrip as "half-breeds" under the *Dominion Lands Act*. It is, of course, possible that individual Metis were also included in the remaining

numbered treaties in the prairie provinces. There are also mixed-blood persons in British Columbia who self-identify as Metis but have no connection at all with any of these events.

Academic Commentary on Metis Identity

Many modern academic commentators have attempted to come to grips with the riddle of Metis identity. Donald Purich in his 1988 book, *The Metis*, notes that 'Metis' is used in three different ways: to embrace all Aboriginal peoples who are neither status Indians nor Inuit; to refer to all mixed-blood persons, even those resulting from modern intermarriage; and to describe the descendants of the historical Metis - "that is, those whose origins can be traced back to the Red River in the early 1800s."⁴⁰ The first usage is incorrect in his opinion, as it covers mainly non-status Indians who, unlike the Metis, wish to acquire Indian status under the *Indian Act* and see themselves more in terms of their descent from a particular Indian nation. The second is apparently acceptable to him to the extent that such persons self-identify as Metis and are recognized as such by a Metis organization. The history and current struggles of the third group are covered in the bulk of his book, which certainly suggests that for him, at least, Red River Metis and their descendants are the more legitimate claimants to the modern term.

Thomas Flanagan⁴¹ and Bryan Schwartz⁴² advert to two populations: the wider population of persons of mixed Indian and non-Indian ancestry, and the descendants of the historical Metis Nation in western Canada. Flanagan notes that for purposes of Aboriginal title, only a legal definition will suffice and suggests that the only available one is in *The Metis Betterment Act*, which refers to Metis as someone of not less than one-quarter Indian blood who is not a status Indian.⁴³ Douglas Sanders agrees that the Metis proper are different from the

wider mixed-blood population that he characterizes as non-status Indians. He too associates the term Metis with the historical Metis Nation of early Manitoba and finds the only available legal definition of Metis in the "half-breed" grants under the *Manitoba Act* and the *Dominion Lands Act* whereby promises were made in statutory form to them.⁴⁴ William Pentney generally agrees, but would include in that legal definition those who were entitled to receive scrip but who did not and their present-day descendants.⁴⁵ It is important to realize, however, that the approach of both Sanders and Pentney implies greater certainty than it delivers, since the legislation in question provides little direction as to who was eligible to obtain the land grants or scrip.

In a more recent article, Catherine Bell reviews the issue in terms of the requirements of section 35(2) of the *Constitution Act, 1982*. She notes that a number of terms have been used throughout Canadian history to designate the Aboriginal inhabitants and that the fragmentation of terminology in this regard "is partially due to the introduction of legal and administrative definitions for various native groups through federal Indian legislation and assistance programs" and that "[f]urther divisions have been created by the denial of federal responsibility for metis and non-status Indians...".⁴⁶ Given the fragmentary and political nature of the terminology now being used, she assembles five broad categories of persons that could be defined as Metis:

1. anyone of mixed Indian/non-Indian blood who is not a status Indian;
2. a person who identifies as Metis and is accepted by a successor community of the Metis Nation;
3. a person who identifies as Metis and is accepted by a self-identifying Metis community;
4. persons who took, or were entitled to take, half-breed grants under the *Manitoba Act* or *Dominion Lands Act*, and their descendants; and

5. descendants of persons excluded from the *Indian Act* regime by virtue of a way of life criterion.⁴⁷

Her own resolution of the debate is for purposes of her reading of the requirements of section 35 and focuses on those falling within the second and third categories: descendants of the historical Metis Nation, and persons associated in some way with current Metis collectivities.⁴⁸

Lussier cautions, however, against imposing on nineteenth-century mixed-blood people modern definitions and notions of their essential homogeneity in terms of the primacy of their historical sense of political collectivity. Lussier's review of the writings of certain nineteenth-century commentators indicates that the historical Metis and half-breeds of western Canada were not necessarily a homogeneous group possessed of a shared group identity, despite the two conflicts with Canada led by Louis Riel.

It is important, therefore, to realize that there were many mixed-blood groups at Red River during the nineteenth century and that each was distinct religiously, linguistically and even geographically. To write now as if they were a homogeneous group is to distort history and, more important, attribute characteristics and historical drama to groups that did not see themselves as such.⁴⁹

Likewise, there are many people today who are eligible to be regarded as Metis under whichever definition is being used who do not choose to identify themselves in this way, while there also distinctly different approaches between those who see the only Metis within the context of the Metis Nation of the West connected to the Red River era and those who favour a pan-Canadian view.

The Fluid Frontier Between Indian and Metis

The various versions of the *Indian Act* since 1876 have not clarified matters, primarily because of the failure to settle on a consistent basis for defining 'Indian' even for the limited administrative purposes of the

Act. The definition over the years has allowed the inclusion of persons with no Indian blood whatsoever through marriage or adoption, has resulted in the absolute exclusion of others of 'pure' Indian blood and, by including some and excluding others of mixed blood (largely on a patrilineal basis) has left the overall question of the status of mixed-blood persons in doubt. Douglas Sanders notes that "mixed blood peoples were not excluded from Indian status when membership lists were first prepared and could not now be excluded from Indian status without purging the Indian-reserve communities of at least half their population."⁵⁰ A number of largely lower court decisions concerning the hunting and fishing rights of 'Indians' under treaty and statute have wrestled inconclusively with the issue, sometimes finding that the relatively narrow *Indian Act* definition was controlling,⁵¹ sometimes finding the opposite.⁵² Rather than reducing the level of uncertainty regarding who the Metis are, the amendments to the *Indian Act* in Bill C-31 in 1985 - which attempted in an incomplete way to eliminate discrimination so that the Act would not conflict with section 15 of the *Canadian Charter of Rights and Freedoms* - have only added to the confusion.

Many individuals who had lived their entire lives as Metis suddenly found themselves eligible under Bill C-31 to be registered as status Indians, in part due to the repeal of the disenfranchisement of recipients of scrip and their descendants in the former sections 12(1)(a)(ii) and (iii). Even some Metis political leaders have now been registered under the *Indian Act*, as have residents of the Metis settlements in Alberta. In the latter case this has led to a conflict with the definition of Metis in the *Metis Betterment Act*⁵³ and could have required their ouster from the settlements. This problem has been overcome on the surface in the *Metis Settlements Act* of 1990,⁵⁴ as the

definition of Metis now means "a person of aboriginal ancestry who identifies with Metis history and culture",⁵⁵ coupled with control over membership residing in each settlement council. On the other hand, subsection 75(1) of the *Metis Settlements Act* excludes from membership anyone who is registered under the *Indian Act* or registered as an Inuk under a land claims settlement (subject to a very limited exception in subsection (2)).⁵⁶

As a result of Bill C-31 it is possible, therefore, for some people who define themselves as Metis to register under the *Indian Act* and to be legally labelled as status Indians. At the same time, other Metis people who are eligible for registration under the *Indian Act*, and are therefore legally Indians for some purposes (because of the definition of Indian in subsection 2(1), which includes people who are "entitled to be registered"), may choose not to seek registration for personal reasons or to avoid losing benefits and rights flowing from the Alberta Metis settlements.

Methods of Defining Aboriginal Group Membership

Historically a number of approaches have been used in Canada and elsewhere to designate certain persons as entitled to unique legal status by virtue of Aboriginal heritage. Little attention has been paid to this question in the academic literature.⁵⁷ Most of these approaches involve objective tests that have been applied by the dominant society to Aboriginal groups, usually without a high degree of consent by those affected or even consultation with them.

1. Blood quantum: One could simply require a set minimum percentage of Aboriginal blood. In the United States, for example, the Bureau of Indian Affairs offers a certain number of services and programs to 'Indians' only if they are members of

federally recognized tribes living on or near federal reservations and if they possess a minimum of one-quarter Indian blood.⁵⁸ A one-quarter blood requirement for participation in Indian monies was imposed in Canada in 1869 in *An Act For the Gradual Enfranchisement of Indians*.⁵⁹ This requirement was not maintained when the various post-Confederation statutes were consolidated in the 1876 *Indian Act*.⁶⁰

2. Kinship: This is a related standard that focuses upon the family connection to members of the group already recognized or accepted as collectively Aboriginal. It is less blood quantum (although by definition kin must normally have some blood relationship unless the kinship is a construct to accommodate outsiders being absorbed) than descent from either or both of the father's or the mother's line that counts. An example is the former *Indian Act*⁶¹ mixed marriage provision for conferring status on the children of Indian fathers and non-Indian mothers, but not on those of non-Indian fathers and Indian mothers. While children of the latter pairing would have the same Indian blood quantum as those of the former, they would not be recognized in law as 'Indian' since the Act used a patrilineal system regardless of the tradition of the Indian nation concerned.
3. Culture, lifestyle or belief: This approach focuses on whether a people sharing certain characteristics is sociologically a distinct 'group' or 'community'. Blood quantum and kinship are less important than the subjective sense of belonging marked by certain objective behavioural characteristics that group life entails. One such objective characteristic might be the maintenance of cultural characteristics or institutions different from those of the dominant society.

The Red River Metis offer one example. Although they obviously had a significant degree of Indian ancestry and had kinship links to each other and to the Indian nations around them, it was their buffalo hunting lifestyle, their singular culture derived from many sources, and their sense of themselves as constituting a community or nation apart that marked them as a separate group. It is from this heritage that they trace their descent as a group. But it is precisely this mixed cultural heritage and the fact that it contains European elements that makes it difficult for some people to classify the Metis as 'Indians' in a constitutional sense.

4. Acceptance by an Aboriginal group: This approach also focuses on sociological criteria, namely, whether the group itself recognizes someone as a member of the community. As mentioned previously, in the United States the federal government will accept someone as Indian (for purposes of their participation in the separate sovereign political entity represented by the tribe under American law) if that person is accepted by the tribe in question as one of its members. Formal enrolment on tribal membership rolls is not a necessary condition. Depending on the tribal membership code in question, this approach may often allow inclusion of those with a relatively small degree of Indian ancestry. This approach of emphasizing community acceptance is an essential element of the systems in place in New Zealand and Australia, both of which also require self-identification and some undefined level of indigenous ancestry.

As already noted,⁶² during the negotiation of the Robinson-Superior and Robinson-Huron treaties in Canada, the chiefs urged the inclusion of the "half-breeds" living among them in treaty benefits; the colonial negotiators left it to the chiefs to decide how and

to what extent to allow these people to participate. In other words, if the band accepted them as members, the government would not object and would treat them the same as all other members.

5. Acknowledgement as Aboriginal by the dominant society: This is really the reciprocal of the preceding approach, as it concentrates upon whether the dominant society recognizes someone as belonging to a different group or community. It is the acknowledgement of difference: the recognition and acceptance that the 'others' collectively form a distinctive group. This approach often lies at the base of racism and some forms of nationalism generally.

The fact that this approach often but not always leads to invidious consequences must not be allowed to diminish its possible validity. It is to this sense of difference on the part of the dominant society that the national Aboriginal organizations have been appealing in their recent efforts to obtain constitutional recognition of Aboriginal peoples as societies apart under a separate legal regime that will enable them to protect that difference.

6. Charter designation: Recognition of special status by some criterion as of a certain date, with ineligibility to obtain such status after that date except perhaps through direct descent. The most familiar example would be the *Indian Act* registration system introduced by the 1951 amendments: existing band lists or the general list at the time the Act came into force became the register (subject to verification, correction and protest) of the charter members of the group that the federal government was prepared to recognize as status Indians.⁶³
7. Self-identification: Unlike the other approaches, this is a subjective test that relies on the individual concerned to know whether he or she is part of a group or community set apart from

others in a given society. Shared group consciousness is the essential factor in this approach. The federal government has relied on self-definition in the past through its encouragement to 'half-breed' members, and sometimes as well to 'full-blood' members, of Indian bands in some of the numbered treaties to renounce their treaty rights as Indians so as to self-identify as Metis and thereby to take scrip.⁶⁴

Today, entitlement to Aboriginal-specific federal programs - ranging from those offered by the Central Mortgage and Housing Corporation to Aboriginal-operated housing authorities, to services offered by friendship centres funded by the Secretary of State, to benefits such as entry into the Legal Studies for Aboriginal Persons Program through the Department of Justice, or to opportunities for employment within the federal public service through the Public Service Commission - is based on self-identification as an Aboriginal person. This likewise applies in reference to many programs operated or authorized by provincial governments.

In Canada colonial and later federal governments have used most of the approaches listed above at one time or another since 1850 in attempts to designate those for whom they were willing to take responsibility.

The use of one or the other criterion, or several in combination, has not been consistent, however, and has rarely enjoyed a wide degree of support from the Aboriginal peoples to whom such criteria were applied. The federal government recently attempted in the 1985 amendments in Bill C-31 to alleviate some of the problems it had previously created through the *Indian Act*. It has not clarified the inconsistent approaches, unfortunately, and in fact may have engendered new problems.⁶⁵

So, where does this leave the debate? It is beyond the scope of this inquiry to resolve the issue once and for all. It is clear that the term 'Metis' now encompasses far more people in a much larger geographic area than the original French-speaking and Roman Catholic Metis inhabitants of the Red River area of Manitoba. It also covers the other mixed-blood persons in that region originally referred to as 'half-breeds' or 'country-born'. It further includes those who took, or were eligible to take, scrip under the *Manitoba Act, 1870* and the *Dominion Lands Acts*. It must also cover the descendants of all these people. It should logically also cover those persons living within the Alberta Metis settlements as Metis whether or not they are descendants of scrip recipients. And, at the risk of criticism from purists as well as from many western Metis, and because the term's origin essentially means mixed blood, the presumption here will be that the term Metis, as opposed to members of the Metis Nation, can potentially refer to all persons of mixed Aboriginal and non-Aboriginal ancestry across Canada regardless of historical origin. This is the only way, for example, in which some of the Metis in the Northwest Territories, who are widely recognized as Metis and accepted as such in land claims negotiations or agreements recently reached with the government of Canada and the territorial government, can come within the term Metis. In one recent lower court decision that considered the issue, the judge concluded simply that "[i]t appears that today's Metis could be someone of some North American Aboriginal blood who holds himself out as such."⁶⁶

Catherine Bell makes a strong point in emphasizing the importance of collective Metis life, self-identification and acceptance as belonging to that collective life. Perhaps the Australian experience offers a useful point of reference in the definition debate. Although the law

and policy respecting Aboriginal rights are less developed in Australia than in Canada and the United States, the need for a definition of 'Aboriginal' has long since arisen. Aboriginal people themselves have devised a three-part definition that has gained rapid acceptance among the governments in Australia. To be considered in law an Aboriginal person, an individual must (1) be of Aboriginal ancestry; (2) self-identify as Aboriginal; and (3) be accepted by the Aboriginal community as being Aboriginal.⁶⁷ This description has also been used to include the distinct indigenous peoples of the Torres Strait Islands. The Maori of New Zealand have developed a similar approach to describing themselves, which is recognized by the government in all its laws, policies and programs. In neither case does this deny the important role that regional tribes or groups play regarding land and resource rights or culture and language.

It is suggested that a similar test should be employed in Canada regarding which individuals ought to be considered Metis for constitutional purposes. Such a person must be of mixed Indian and non-Indian blood (or Inuit and non-Inuit in the case of southern Labrador), regardless of the historical or geographic origins of that mixing. Such a person must, in addition, self-identify as Metis. Most important, such a person must be accepted by, and must accept to be a member of, a self-identifying Metis community.⁶⁸ That community could be urban or rural and anywhere in Canada such that it need not be a part of the modern Metis Nation. It must, however, be the current vehicle of Metis collective identity in Canada in a way that enables it and its members to call themselves Metis in 1993. It should also be noted that a pan-Canadian approach to the definition of Metis does not mean that all Metis communities would possess the same legal rights or status, any more than the use of the term Indian across the country means that all Indian people have the same Aboriginal, treaty or other

rights. Furthermore, this approach would likely result in a distinction between those who affiliate with the Metis Nation born in the prairies and those who have both a different history and a different approach toward the future. In both cases, however, it is ultimately up to the Metis themselves to define who they are and what their aspirations will be.

THE PRE-1982 CONSTITUTIONAL STATUS OF THE METIS

Reducing Constitutional Obligations Toward Indians

In 1867 the federal Parliament was assigned what was widely assumed in Euro-Canadian circles as constituting exclusive legislative authority regarding "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. That assignment of legislative authority is still the subject of considerable uncertainty,⁶⁹ largely because the precise parameters or scope of this grant of power have never been addressed thoroughly by the courts. The traditional legal view has been to consider section 91(24) as just another head of power similar to the rest of sections 91 and 92 in the sense of extending to Parliament an exclusive sphere of jurisdiction. An alternative approach has been developing in recent years, vigorously advocated by Aboriginal leaders, namely, that the role of section 91(24) is to identify the Crown in right of Canada as the proper party able to negotiate treaties with Aboriginal nations and the primary holder of the fiduciary obligation owed to Aboriginal peoples. Under this approach, the authority to legislate evident in section 91(24) is restrained by factors outside the wording of the *Constitution Act, 1867* so as to be neither exclusive nor fully discretionary. This distinction between responsibility and jurisdiction, as well as the important aspect of fiduciary obligation

similar to the duties of a trustee, are examined in greater detail later in this paper.

Parliament has never legislated to the full extent of its apparent authority concerning what territory is encompassed within the "Lands reserved for the Indians" in the broad sense of the *Royal Proclamation of 1763* (as opposed to reserves under the *Indian Act*) or over all those people who potentially fall within the constitutional category of "Indians". It has instead viewed "Lands" narrowly and created two separate groups of "Indians" for administrative purposes: those recognized as Indians and registered as such under the *Indian Act*, and those not so recognized. Only the former have generally been viewed by the federal government as falling within Parliament's exclusive legislative jurisdiction over "Indians" under section 91(24), even though Parliament has regularly shifted the boundaries between the two groups by altering the definition of Indian under the *Indian Act*.

Parliament's power to differentiate between categories of Indians was addressed in a cursory way in 1974 in *A.G. Canada v. Lavell*⁷⁰ by Ritchie J. and expanded upon by Beetz J. two years later in *A.G. Canada v. Canard*,⁷¹ a case concerned with whether the special laws on Indian estates in the *Indian Act* violated the *Canadian Bill Of Rights* as discrimination on the base of race. Beetz J. declared that the classification was essentially racial:⁷²

The *British North America Act*...by using the word 'Indians' in s. 91(24) creates a racial classification and refers to a special group for whom it contemplates the possibility of special treatment. It does not define the expression "Indian". This parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values...or of legislative history.

Thus, he noted that jurisdiction over "Indians" under section 91(24) "could not be effectively exercised without the necessarily implied power to define who is and who is not an Indian and how Indian status is acquired or lost." Parliament may, therefore, make use of "such distinctions as could reasonably be regarded to be inspired by a legitimate legislative purpose" so long as the relevant criteria are "within constitutional limits."⁷³ He did not elaborate either the legislative purpose or the constitutional limits to which he referred.

Two things should be noted regarding these statements. First, the emphasis on race must mean by blood descent. That is how Mr. Justice Beetz regarded Parliament as gaining jurisdiction under section 91(24) in the first place. The distinctions subsequently adopted on the basis of "marriage and filiation" are considered by Beetz J. as being only for purposes of the effective administration of that original grant of legislative power. Such distinctions, however, cannot control whether original jurisdiction exists, for that is a matter within the exclusive authority of the courts. Beetz J. suggests that this exercise should be based on race, but without considering the alternative view that "Indians" refers to political groupings of separate peoples who are self-determining. In other words, Parliament through the legislative exercise of its constitutional jurisdiction cannot narrow or otherwise detract from its original jurisdiction. It can only decide not to exercise it as fully as it might otherwise do.

The anomaly of two populations of ethnological Indians, one under federal jurisdiction and the other presumably not, was never successfully challenged because of the prevailing view of the nature of parliamentary legislative authority. Parliament is supreme under this view and is therefore under no moral, legal or political obligation to legislate to the full extent of its constitutional authority or jurisdiction in any field. In matters having to do with Indians, it is well known that

Parliament has had to be prodded by the courts before it would respond positively even to the clearest demonstrations of the need for remedial legislation or other action under its constitutional authority. Bryan Schwartz notes in this regard that "a head of legislative authority under the *Constitution Act, 1867* is, generally speaking, legal authorization to exercise power; it allows legislatures to do things *to* people, but, does not require them to do things *for* people."⁷⁴

In *Re Eskimos*,⁷⁵ for example, despite the opinion of the lawyers for the federal Crown that Inuit (then referred to as Eskimos) were indeed "Indians" for the purposes of section 91(24), the federal government persisted in opposing Québec's argument to this effect until it was confirmed by the Supreme Court of Canada following several years of preparation.⁷⁶ In the more recent example of *Calder v. A.G.B.C.*,⁷⁷ the federal government re-instituted the modern treaty-making process (under the policy to settle comprehensive claims announced in August of 1973) under its exclusive constitutional authority only when reminded by the Supreme Court that Indians did indeed have something over which to treat.⁷⁸ The examples could be multiplied; the point is that the federal government has rarely asserted its jurisdiction over constitutional "Indians" unless pressed to do so by events, court decisions, or a sense of self-interest.

The overall trend over time confirms this, showing a pattern of attempts to restrict the scope of federal obligations respecting Indians. This pattern has shown itself in several ways.⁷⁹ The first has been simply to refuse to accept legislative authority over certain groups of Aboriginal persons. As mentioned, Inuit were not accepted as falling within federal jurisdiction until 1939. Even with the decision of the Supreme Court, Parliament has chosen not to enact legislation to advance or protect the rights and interests of the Inuit, although certain

special programs and statutory acknowledgements have been extended to them.

The second way has been to reduce the population of section 91(24) "Indians" for whom it would exercise legislative authority. Failing properly to enumerate all the Indians to be registered in all parts of the country (e.g., omitting Indians in Newfoundland and remote parts of several provinces), promoting voluntary and involuntary enfranchisement, precluding Metis who took scrip under the *Manitoba Act, 1870* and *Dominion Lands Acts*, and defining Indian under the *Indian Act* ever more narrowly have been the major devices employed to effect this reduction in numbers.⁸⁰ Not only has this restrained financial expenditures, but it has also served to reduce the pressures for additional land that it might have been necessary to make available to support a growing population on limited reserve land.

Another method has been to ignore or delay the obligation to provide land to those Indians who did have status under federal rules. As mentioned, the legal obligation to settle land claims based on Aboriginal title was ignored for decades until the courts forced action beginning in 1973. The failure to allocate the amount of land agreed upon where land cession treaties were made (to the point where there may now be insufficient unoccupied Crown land fully to satisfy treaty land entitlement claims in southern regions of the prairie provinces) is another example. The refusal to negotiate or otherwise settle specific claims to land until forced by the political pressure exerted in the aftermath of the 1969 white paper is yet another, with the limited success in resolving such claims over the past 24 years simply compounding the problem. Even where treaties or their modern variant, the comprehensive claim, have been negotiated, considerable delay has ensued, in part as a result of the federal insistence that the provinces be involved at all stages.⁸¹

The federal government has attempted in addition to shift the burden for the delivery of services from itself to the provinces even with respect to status Indians. For example, when residential schools began to close in the 1960s, there was no initial move by the federal government to reimburse the provinces for the influx of large numbers of status Indian children into the provincial school system. Nor were the provinces reimbursed initially for the additional burden on their child welfare systems. Only when forcibly pressured by the provinces was the federal government willing to enter into cost-sharing agreements for these and other related services. Establishing First Nation-controlled alternatives to both the former federal and the provincial systems were not even considered. The present federal stance is that it has no obligations and that the responsibilities, which it asserts have been assumed by and large voluntarily, end for the most part at the edge of the reserve. As a result, status Indians living off-reserve, as well as non-status Indians, are considered to be primarily a provincial responsibility.

The major attempt of the federal government to reduce its mandate under section 91(24) has been by vacating the field entirely. This would have been the effect of the 1969 white paper had it been implemented. In effect, status Indians would have joined non-status Indians and Metis as provincial residents for nearly all purposes, with federal responsibility restricted to measures to assist the transition from federal jurisdiction. There would then have been no "Indians" of any kind left over whom to exercise legislative authority under section 91(24). That constitutional power would thereby have become 'spent', such that all arguments regarding whether certain categories of persons did or did not fall within federal constitutional jurisdiction would have been merely of academic interest, except of course for the people directly affected.

In short, the actual post-Confederation practice of the federal government has been in the direction of narrowing or avoiding its responsibilities, even where the obligation to meet those responsibilities has been clear. This has not changed following the advent of the *Constitution Act, 1982*. If anything, the desire to restrict transfer payments to the provinces has increased with the growing federal budget deficit. Nor has section 35 of the *Constitution Act, 1982* improved matters. The federal government argues that section 35 has actually restricted its power under section 91(24) of the *Constitution Act, 1867* because it can no longer pass legislation that conflicts in any way with the rights protected in section 35.⁸² Moreover, the emphasis on the necessity of provincial involvement in matters involving Indians has spread to areas other than treaties and land claims. Community-based self-government negotiations within the reserve context, as well as local police and criminal justice initiatives with *Indian Act* First Nations, are generally conducted on a tripartite basis now, at least to some degree. This can effectively provide the provinces with inroads into areas of federal jurisdiction by virtue of the provincial government becoming a formal party to any agreement reached, particularly if the agreement envisages or is followed by provincial legislation.⁸³ This approach reduces federal obligations, at the very least financially, correspondingly to the degree to which the province is acknowledged as having authority or undertakes obligations in its own right (e.g., the 1991 social services agreement in Alberta affecting all status Indians in the province regardless of residence). Interpretations of section 91(24) by the courts have aided in this effective transfer of authority along with the recognition by provincial politicians of the extent of the socio-economic crises that exist on far too many reserves.

In many ways, the post-Confederation federal practice regarding its responsibilities toward Indians is merely a continuation of the policy

adopted by colonial authorities in the Province of Canada only a few years before Confederation. At that time, official policy turned toward limiting obligations to Indians by reducing the number and remaining territory of Indians, thereby freeing Indian land for white settlement. Prior to that, of course, official British policy since the *Royal Proclamation of 1763* had been to view Indian bands essentially as self-governing units that formed part of sovereign "Indian Nations or tribes", allied to the Crown and to be protected in their land base from white squatters and land speculators. The result of this fundamental change in policy was the creation of the reserve system and the various pieces of early colonial legislation intended to protect Indian lands from trespass and seizure for debts while sustaining the Aboriginal title doctrine requirement that land could be sold or given away only to the Crown.⁸⁴

In the early 1800s – and with the generally willing assistance of most Indian communities in the southern portion of Upper Canada, who saw their capacity to maintain their traditional economy disappear with the dramatic influx of United Empire Loyalists and new colonists from Europe – the original goal changed somewhat to include the notion of preparing Indians for participation in the western economic system that was emerging as their subsistence base, other than fishing, was being destroyed by settlement. This was the goal of ‘civilization’, of teaching Indians how to cope with Europeans on European terms. Somewhat later, however, this goal was overtaken by other forces that wished to see Indians completely absorbed and assimilated into the larger surrounding non-Indian society. These forces were motivated in part by the pressure for land in those parts of Upper and Lower Canada that were now filled with white settlers and where relatively large tracts were still reserved for exclusive Indian use and occupation under the

reserve system.⁸⁵ The primary methods chosen to accomplish assimilation were enfranchisement and individual land allotment.

The enfranchisement provisions in the various acts, beginning in 1857, represent a total change in policy by colonial and later federal authorities regarding the continued existence of self-governing Indian communities possessing their land collectively. Enfranchisement and the parcelling out of individual allotments from the communally held reserve land for enfranchised Indians were deliberate attempts to undermine the values holding Indian bands and communities together as such in order to hasten assimilation. This policy may well have been inspired by similar efforts in the United States, where allotments were used as a method of terminating tribal existence.⁸⁶

This new strategy began with the first of the enfranchisement acts in 1857: *An Act for the Gradual Civilization of the Indian Tribes of the Canadas*.⁸⁷ The provisions in this Act for voluntary enfranchisement remained virtually unchanged through successive acts and amendments until recently.⁸⁸ The subsequent version⁸⁹ provided that the land allotted to an enfranchised Indian from within the reserve came with rights of inheritance. Compulsory enfranchisement for any Indian who became a doctor, lawyer, teacher or clergyman was introduced in the *Indian Act* in 1876.⁹⁰ Four years later an amendment removed the involuntary element. In 1884 another amendment removed the right of the band to refuse to consent to enfranchisement or to refuse to allot the required land. Further amendments in 1918 made it possible for Indians living off-reserve to be enfranchised. The most drastic change occurred in 1920, however, when the Act was amended to allow once again compulsory enfranchisement of Indians. This provision was repealed two years later but reintroduced in modified form in 1933 and retained until the major revision of the Act in 1951. Compulsory enfranchisement of Indian women who married non-Indian, Metis or

unregistered Indian men was introduced in 1869 and retained consistently until repealed in 1985 by Bill C-31.⁹¹

Not even the treaty-making process was free from the emphasis on limiting obligations to Indians. Despite the official view that through the treaty-making process, particularly in the prairies, the Canadian government was honourably continuing the historical British policy of acquiring land held under Indian title in a constitutionally sound manner through treaty land cessions, the actual history of settlement demonstrates that "pressure and fear of resulting violence is what motivated the government to begin the treaty-making process."⁹² This was to some extent the motivation for the Robinson-Huron and Robinson-Superior treaties⁹³ and more evidently so for the subsequent numbered treaties. The National Policy of Sir John A. Macdonald required making land available in the West for settlement by Europeans and construction of a transcontinental railway. The Indians of the northwest were relatively numerous and militarily significant and had been influenced both by the treaty-making process engaged in by the United States with tribes living south of the 49th parallel and by the Metis experience in Manitoba. They were determined not to part with their land except in exchange for firm guarantees from the new federal authorities, and they forced the federal government to negotiate with them for it.⁹⁴

In summary, if actual colonial and later federal policy and practice indicate anything, they demonstrate from the beginning an extreme reluctance on the part of the appropriate level of non-Aboriginal government properly to fulfil its constitutional obligations toward Indians. This is especially the case with regard to the federal government under section 91(24). This is an important point to make because of the argument put forth that the relative lack of federal legislative and other initiatives with respect to Metis or 'half-breeds' as

such, the limited nature of those few that were undertaken, and the disclaimers by historical political figures of federal obligations to Indians and mixed-blood persons attest to an absence of federal jurisdiction over Metis as "Indians" under the Constitution.

Legal History: References to Metis and Half-Breeds

Given the historical reluctance of the federal government even to acknowledge, let alone carry out, its obligations toward all of the section 91(24) "Indians" generally, such a shortage of federal legislation and other initiatives should not be surprising. It cannot be forgotten that there were none at all of substance with respect to the Inuit, who were always under federal constitutional jurisdiction, even though the federal government began to resist this view in the twentieth century until the Supreme Court of Canada decision in *Re Eskimos* conclusively settled the matter.⁹⁵ Likewise, the federal government has continually resisted exercising any authority regarding the Aboriginal peoples residing in Newfoundland and Labrador since that colony entered Confederation in 1949.⁹⁶ In fact, in light of overall federal policy at that time in favour of enfranchisement and individual land allotment, it is both legally and historically significant that any references to rights accruing to the Metis or 'half-breeds' as such occur at all. Thus, it would seem that the opposite conclusion should be drawn: any federal legislative or other initiative referring to 'half-breeds', 'mixed-bloods' or 'Metis' should be given added weight. Had the Inuit been similarly referred to in any federal legislation or initiative prior to 1939, for instance, surely that would have been a matter to which the Supreme Court in *Re Eskimos* would have attached great significance.

Nor should the weight to be given to such references be diminished by arguments based on the record of political debates,

official correspondence or the diary entries of participants in discussions surrounding Metis or half-breed rights at the time of the entry of Manitoba into Confederation. Both Thomas Flanagan⁹⁷ and Bryan Schwartz⁹⁸ make extensive reference to such sources in attempting to cast doubt on the legal accuracy of terms like "Indian Title" that appear in legislation and orders in council regarding "half-breeds". This approach seeks a level of clarity and precision of purpose that was rarely articulated at that time, as is evident by the complete lack of record in the debates of the Fathers of Confederation when they drafted section 91(24) of the *British North America Act* of 1867.

It also fails to acknowledge the political, economic and military forces that drove government policy. Since the Inuit, for example, were neither a military threat nor of significant economic import, and since they occupied territory that was neither desired for settlement nor believed to be rich in resources, such that they were not seen to be an obstacle to be overcome in smoothing the way for white Canadians in the nineteenth and early twentieth centuries, there was virtually no attention paid to them by Parliament or by federal officials. The absence of legislation or other initiatives made it more difficult for the Supreme Court to reach a decision in *Re Eskimos*, but this was obviously not determinative.

Arguments of this nature, however, are better seen as illustrations of the differences in methodology between history and law than as indications of the legislative intent behind such provisions. The purpose of legislation and orders in council simply cannot be construed by relying on the statements that Sir John A. Macdonald may have made, for example, in the heat of debate over politically contentious issues in the House of Commons. The intention of the enacting legislature is a question of law that cannot be reduced to the intention of politicians or officials whose reasons for saying and doing what they did under the

pressure of events long past may not have been influenced by legal considerations at all.⁹⁹ The Supreme Court of Canada has noted that there is a distinction to be drawn between the intended meaning of words in the minds of persons who may even have been directly involved in drafting a particular text, and the meaning in law that will be found by reference to broader values and a wider context.¹⁰⁰

Arguments based on purely historical references have been advanced on both sides of the debate around whether Metis fall within federal constitutional jurisdiction under section 91(24). Clem Chartier¹⁰¹ and Bryan Schwartz¹⁰² have adopted a form of analysis of historical materials referred to in *Re Eskimos* that focuses on extracting from the recorded oral testimony of Hudson's Bay Company officials references to Indians and Metis favourable to the side of the debate each one supports.

In our view, however, it is neither necessary nor fruitful to enter this debate for three reasons. In the first place, the evidence is intrinsically ambiguous and the possible interpretations mutually contradictory, as shown by the opposite conclusions drawn by Chartier and Schwartz and by two judges who have entered the fray.¹⁰³ As a result, the historical record that was before the Court at that time is simply not helpful in assisting in reaching a proper legal interpretation as to whether the Metis are constitutionally "Indians" within the meaning of section 91(24).

In the second place, the decision that legitimizes the use of these sources, *Re Eskimos*, "was concerned with analyzing historical references to Eskimos, not Metis, and references to the latter are incidental."¹⁰⁴ There are other sources of information not referred to in that case regarding the treatment afforded to persons of mixed blood, such as the report of Alexander Morris¹⁰⁵ on treaty negotiations, and pre-Confederation legislation, among other sources, that cast things in a

different light. The Hudson's Bay Company testimony and materials cited are in reference mainly to the Red River Metis and half-breeds in any event and do not cover mixed-blood persons living in areas then under direct British or colonial rule.

Third, and more important, this debate carries the historical approach in *Re Eskimos* too far. *Re Eskimos* concerned the question whether Inuit were "Indians" within the meaning of section 91(24). In the absence of any instances of official federal government interest in or exercise of jurisdiction over Inuit, the Supreme Court adopted an historical approach concentrated upon whether "Eskimos" were considered to be "Indians" at the time of drafting the *Constitution Act, 1867* at Confederation. The Court was forced by the absence of federal initiatives to focus extensively on extra-legal and extra-constitutional materials, and the judges came to rely heavily on materials prepared by the Hudson's Bay Company. In particular, the Court relied on a census of Hudson's Bay Company possessions, for purposes of an inquiry by a parliamentary committee in 1856-57. Much was made by the Court of the listing of the "Esquimaux" among the Indian tribes.

That same census is referred to by both Schwartz and Chartier because it lists "half-breeds" with "whites" for purposes of total population figures. Chartier adduces evidence to show that this listing was not definitive, while Schwartz interprets similar evidence to come to the opposite conclusion. But the situation faced by the Supreme Court in 1939 with regard to the Inuit is different from the situation it would face respecting the Metis in 1993. In the case of the Metis, unlike that of the Inuit, there is a relative wealth of pre-Confederation British and post-Confederation federal practice and legislation to refer to, right up until recent times.

Historical practice regarding mixed-blood treaty benefits and residence rights on reserve land is provided by a number of sources

already mentioned¹⁰⁶ and indicates that mixed-blood persons were viewed by Indian nations or bands and colonial legislators alike as forming part of the Aboriginal group entitled to continue under Crown protection apart from non-Aboriginal society. Much early colonial legislation is designed specifically to protect the residence rights of mixed-blood persons to reserve land that was otherwise subject to serious encroachment by non-Indian trespassers and settlers.

The most frequently cited example is the 1850 colonial statute, *An Act for the better protection of the lands and property of Indians of Lower Canada*,¹⁰⁷ that defined "Indian" for these purposes as follows:

First - All persons of Indian blood reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants;

Secondly - All persons intermarried with such Indians and residing amongst them, and the descendants of all such persons;

Thirdly - All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such;

Fourthly - All persons adopted in infancy by such Indians, and residing upon the land of such Tribe or Body of Indians, and their descendants;

Although this legislation obviously protects mixed-blood residency rights as equal to those of full-blooded persons, it unfortunately "established the precedent that non-Indians determined who was an Indian and that Indians would have no say in the matter."¹⁰⁸ This is important to note, because there was no question at the time that Indians in fact knew who was also an Indian, and they were under no doubt that 'mixed-blood' members of their communities were just as much Indian as 'full-bloods'.

The 1850 definition was narrowed considerably in 1851, presumably as a response to the evolving policy, already described, of

encouraging assimilation. Another and related explanation focuses on the need simply to reduce the number of people who might be entitled to land under the reserve system so as to reduce this land base, thereby enlarging the quantity of land available for use by non-Indians.¹⁰⁹

Thus, the definition was amended so that non-Indian men who married Indian women would no longer acquire Indian status, no matter where they resided with their spouses or how the Indian community viewed them. The effect of this change was also to impose the European concept of male domination through patrilineality and patrilocality to Indian nations. Subsequent versions of this legislation went back and forth on the question of whether non-Indian men could acquire Indian status through marriage, until 1860, when *An Act Respecting Indians and Indian Lands*¹¹⁰ was adopted, defining Indian so as to exclude non-Indian men and their descendants (if the descendants were not residing in Indian communities under the second part of the definition) from Indian status:

Firstly. All persons of Indian blood, reputed to belong to the particular tribe or body of Indians interested in such lands or immoveable property, and their descendants;

Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular tribe or body of Indians interested in such lands or immoveable property, and the descendants of all such persons;
And

Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children or issue of such marriages, and their descendants.

At approximately the same time, enfranchisement legislation, referred to earlier, was passed encompassing the province of Canada. The 1857 Act¹¹¹ simply repeated the definition of Indian from the 1850 Lower Canada lands and property act quoted above. The definition was altered

in the 1859 version, *An Act Respecting Civilization and Enfranchisement of Certain Indians*,¹¹² although it still included persons of mixed Indian and non-Indian blood:

1. In the following enactments, the term "Indian" means only Indians or persons of Indian blood or intermarried with Indians, acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown...

Much of the pre-Confederation legislation concerning Indians and how to define an Indian was simply carried forward under the new Dominion after 1867. For example, in the 1868 *Act providing for the organization of the Department of the Secretary of State*¹¹³ the definition from the 1860 Lower Canada Indian lands statute was adopted without alteration.

In 1869, *An Act for the gradual enfranchisement of Indians*¹¹⁴ was passed providing for a minimum Indian blood quantum:

4. In the division among the members of the tribe, band or body of Indians, of any annuity money, interest money or rents, no person of less than one-fourth Indian blood, born after the passing of this Act, shall be deemed entitled to share in any annuity etc....

All the various laws regarding Indians were ultimately consolidated in the 1876 *Indian Act*¹¹⁵ which defined Indian as follows:

First. Any male person of Indian blood reputed to belong to a particular band;

Second. Any child of such person;

Third. Any woman who is or was lawfully married to such person.

(e) Provided also that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of a family (except the widow of an Indian, or a half-breed who has already been admitted into a treaty), shall, unless under very special circumstances, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty.

4. The term "non-treaty Indian" means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even though such person be only a temporary resident in Canada.

It is interesting to note the reference to "half-breeds" in Manitoba and their deliberate exclusion. This was subsequently extended to all Metis who had taken land or money scrip and their descendants. This provision also foreshadows the later exclusion in section 4 of the 1951 version of the Act¹¹⁶ of "the race of aborigines commonly referred to as Eskimos". The difference, of course, is that in 1951 'Eskimos' had been acknowledged through a Supreme Court decision to be within federal jurisdiction as 'Indians'; hence the need to exclude them explicitly. Would the same reasoning apply to Metis? Does their deliberate exclusion in 1876 imply that otherwise they would fall within the *Indian Act*? As will be discussed below, in reference to *R. v. Howson*,¹¹⁷ there is a degree of judicial support for the proposition that they would.

Thus, the legislative record so far seems to confirm for reserve residency and related purposes the historical practice already noted whereby persons with any degree of Indian blood could be included as Indians under treaty. The issue with respect to the *Manitoba Act, 1870*,¹¹⁸ unlike the legislation discussed so far, is that it does not indicate directly whether the mixed-blood population referred to as "half-breeds" is to be considered "Indian". In section 31 the only connection is the explicit reference to the need to grant land to "half-breed residents" to extinguish "Indian Title":

31. And whereas, it is expedient towards the extinguishment of the **Indian Title** to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the **half-breed residents**, it is hereby enacted, that, under regulations to be from time to time made by the Governor

General in council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the **half-breed** heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine. [emphasis added]

The reference to "half-breed" land grants as a way of extinguishing Indian title was subsequently carried forward and expanded upon in 1874 in the preamble to *An Act Respecting the Appropriation of Certain Dominion Lands in Manitoba*:¹¹⁹

Whereas...it was enacted as expedient towards the extinguishment of the Indian title to the lands of the Province of Manitoba to appropriate...lands for the benefit of the children of the half-breed heads of families residing in the province at the time of the transfer thereof to Canada;

And whereas no provision has been made for extinguishing the Indian title to such lands as respects the said half-breed heads of families residing in the Province at the period named;

Five years later the *Dominion Lands Act*¹²⁰ was passed, extending these land grants to the North-West Territories, as it was then called. It repeated the language of its two predecessors:

125 (e) To satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories outside of the limits of Manitoba, on the fifteenth of July, one thousand eight hundred and seventy, by granting land to such persons, to such extent and on such terms and conditions as may be deemed expedient.

Subsequently, two orders in council followed up in similar terms, referring to the "Indian blood" of the Metis. The first was with regard to Treaty 6:

...on the execution of the surrender by the Indians to investigate the claims any Half-breeds that may be found to be residing within the territory thereby surrendered and to be entitled to be

dealt with under the...Dominion Lands Act...to issue scrip redeemable in land or receivable in payment for land to such of the above mentioned Half-breeds as may be found entitled thereto in full and final settlement of any claim they have by reason of their Indian blood.¹²¹

The second refers to Treaty 8 and repeats the language of the first regarding "Half-breed rights" flowing from their Indian blood:

Whatever rights they have, they have in virtue of their Indian blood; and the first interference with such rights will be when a surrender is effected of the territorial rights of the Indians. It is obvious that while differing in degree Indian and **Half-breed rights** in unceded territory must be co-existent and should properly be extinguished at the same time.¹²² [emphasis added]

In 1899, an amendment to the *Dominion Lands Act* removing the original cut-off date of July 15, 1870 repeated the earlier reference to "claims of half-breeds arising out of the extinguishment of the Indian title".¹²³

Academic Commentary on Metis Constitutional Status

As already mentioned, both Clem Chartier (who has been a longstanding Metis leader) and Bryan Schwartz have offered differing interpretations of the documents and testimony of Hudson's Bay Company officials regarding whether Red River Metis were viewed as constitutional Indians. For the reasons already discussed, that debate does not appear to be the most pertinent way of approaching the question.

Thomas Flanagan, after reviewing the historical circumstances surrounding the passage of the *Manitoba Act, 1870* and subsequent 'half-breed' scrip legislation, concludes that Metis land rights are merely derivative of Indian title.¹²⁴ He comes to this conclusion primarily, it seems, on the basis of a change in language. Up until 1888, the official reference is exclusively to the "Indian title" of the "Half-breeds",¹²⁵ but beginning in 1889, the official tone changes in the two orders in

council cited above to an emphasis on the claim to land that the Metis may have by virtue of their "Indian blood".¹²⁶

As the pre- and post-Confederation legislation regarding Indian reserve land rights and status demonstrates, however, it was mainly if not exclusively by virtue of their Indian blood (in whatever measure), coupled with their collective identity as politically distinct entities or nations that derive this political status from their own pre-existing law rather than from the imported regime, that Indian nations had land rights themselves under British and Canadian law. Their Aboriginal title, in short, was based on two essential elements: their political status and their Indian blood as demonstrating that they are indigenous to this territory, predating the arrival of European colonialism. The latter is the main thing that made them 'Indians', to use the erroneous label of the newcomers. The proof is that when legislative attempts were made to exclude certain persons from reserve land and residency rights, it was men who had no Indian blood whatsoever who were singled out. Their mixed-blood descendants actually resident on reserve were acknowledged as Indians (until subsequent amendments forcibly enfranchised them and their Indian mothers).¹²⁷

Why 'half-breed' rights should be distinguishable, being based only on the quantum of Indian blood, seems to be a distinction without a difference. What was different was not the origin of the right or title to land, but how it was dealt with by government. In the case of the mixed-blood descendants of white men marrying into an Indian nation, it was initially to deny them reserve land and residency rights entirely if they were not residing "among such Indians",¹²⁸ while white women who married in would be absorbed as Indians along with their children. In the case of the Metis, it was by compensating them for their rights to land through the issuance of scrip.

In addition, it is difficult to comprehend how rights to land based on Indian title can be derivative, especially where the legislative references are to "Indian title" as such. Indian or Aboriginal title has been classified in the common law for the last century as a personal right that cannot be held by anyone other than 'Indians' as a collectivity. In *St. Catherine's Milling and Lumber Company v. The Queen*¹²⁹ the Privy Council found that Indian title was a right or an interest in land that could be surrendered only to the Crown, noting that "the tenure of the Indians was a personal and usufructuary right".¹³⁰ *Black's Law Dictionary* defines "personal" as "appertaining to the person" and "usufructuary" as "one who has the usufruct or right of enjoying anything in which he has no property".¹³¹ While recent Canadian decisions have disputed the usefulness of the classification of "personal" and "proprietary" rights in relation to Aboriginal title,¹³² no one has questioned the necessity of possessing a collective identity as a pre-condition to successfully asserting Aboriginal title.

From this, it seems clear that the right of enjoyment (in this case the right to live on and use the resources of the land) can be held only by the persons to whom it appertains. As the title implies, those persons must be 'Indians' in its broad sense. Ethnological Indians have Indian title.¹³³ Inuit, as constitutional Indians, have Indian title.¹³⁴ And the legislative record indicates that 'half-breeds' or Metis also have Indian title. If the others who have Indian title are Indians under section 91(24), wouldn't the Metis be as well? This is the conclusion of Douglas Sanders, who notes:

The exclusion of "Half-Breeds" or "Metis" from the constitutional category of "Indians" would seem contrary to the Manitoba Act, contrary to early practice and disruptive of well-established patterns of Indian policy.¹³⁵

It is unnecessary in the context of this discussion to pursue the argument that the Metis existing within distinct communities or possessing a

self-identity as a nation did not have true Indian title, however, for whatever may have been the views of those drafting the orders in council cited above, they were not reflected in legislation enacted at the same time. The 1899 amendment to the *Dominion Lands Act*, which dispensed with the arbitrary cut-off date of July 15, 1870 - the day Manitoba entered Confederation - for purposes of Metis eligibility for scrip, refers not to a separate species of claim due only to "Indian blood", but to the "satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title."¹³⁶ In fact, what is equally telling is the decision taken in 1899 to dispense with the 1870 cut-off date for "half-breed" claims. This effectively put those Metis who wished to take scrip in the same position as those persons who took treaty benefits. Eligibility for both would be as of the date of the making of the treaty. Subsequently, new scrip had to be issued to Metis in the organized North-West Territories who had been ineligible for scrip under the old cut-off date. Treaty 11, signed in 1921, also made allowance for "half-breed" scrip on the basis of the treaty signing date.

Bryan Schwartz takes a different tack in his opposition to including Metis within the category of constitutional Indians. He challenges the connection between having Aboriginal title and being Indian,¹³⁷ focusing on the purpose of section 91(24) of the *Constitution Act, 1867*, which he sees as intending continuing jurisdiction over Indians. He notes that section 31 of the *Manitoba Act, 1870*, while it may contemplate "Indian Title", also - and more importantly - contemplates its immediate extinguishment, with no further indication of federal government intentions to retain jurisdiction over the historical Manitoba Metis or their lands. He goes on to challenge the legal accuracy of the words "Indian Title" in section 31 of the Act in any event, emphasizing that Sir John A. Macdonald's statements on the subject,¹³⁸ as well as the subsequent legislative

history, support the conclusion "that the Métis are not 'Indians' for the purpose of section 91(24), but that persons of mixed or non-Indian ancestry who lived among and as Indians are."¹³⁹

To a large extent his argument rests on the historical evidence that is also presented by Flanagan. As already mentioned, however, this approach does not necessarily yield the legislative intention. There is, in any event, evidence that Sir John A. Macdonald was not consistent in how he characterized the 'half-breed' land grants when speaking in the House of Commons.¹⁴⁰ Moreover, Schwartz's reference to the purpose of section 91(24) does not appear to be supported by the reasoning of the judges of the North-West Territories Supreme Court in *R. v. Howson*,¹⁴¹ who apparently conclude that the *Indian Act* would have included Metis who had participated in the Manitoba 'half-breed' lands distribution but for the provision in the *Indian Act* specifically excluding them. There is no reason in principle why federal responsibility concerning persons of mixed ancestry generally as well as for the members of the Metis Nation cannot continue in any event, since section 91(24) provides legislative jurisdiction over two separate subject matters, "Indians" and "Lands reserved for the Indians", not over Indians *on* lands reserved for Indians.¹⁴² Noel Lyon points out that if Metis fall within section 91(24), this need not imply their right to Indian status or to reserve land rights or the like, which he describes as "particular devices of Indian law."¹⁴³ He suggests that to the extent they choose to follow Metis culture and not to assimilate, they might claim an entitlement to be covered by some federal laws in areas such as property, civil rights and the family, for example.¹⁴⁴

Schwartz's initial point, however, that the reference to "Indian Title" should be read against the grant of individual land allotments, deserves further consideration. Reading section 31 of the *Manitoba Act*,

1870 in that way raises two distinct possibilities. The first is as he suggests, that the reference to "Indian Title" is legally inaccurate, and all that is accomplished is to grant individual allotments in a more dramatic way, fraught with potential for fraud, than was done for white settlers. In short, Sir John A. Macdonald was right: there is nothing to the opening words of the section. They are legally superfluous and even misleading. It is submitted that this is unlikely. Courts are bound to assume that legislative enactments neither speak in vain nor deliberately mislead. If words are used in an enactment, they are there to be given effect. One would reasonably assume this to be especially the case regarding statutory words given constitutional effect, as is the situation with the *Manitoba Act, 1870* by virtue of the *Constitution Act, 1871*.

The second possibility, therefore, is that the opening words actually mean something. Section 31 of the *Manitoba Act* and the similar references in subsequent dominion legislation to "Indian title" for the "half-breeds" would be read as recognizing the Indian title of the Metis Nation in the prairies and parts of the N.W.T. These legislative references to "Indian title" continued in force well after Sir John A. Macdonald's speech (delivered in the year of the so-called Riel Rebellion) when his assertion, if meant for more than political consumption, should presumably have led to a change in the *Dominion Lands Act* and the subsequent orders in council terminology. Logically, since Indians have Indian or Aboriginal title, section 31 by extension seems to recognize that Metis were constitutional Indians by virtue of their possession of that title. Section 31 also provides the mechanism for extinguishment of that title. In essence, this amounts to a form of involuntary enfranchisement for Metis who chose not to identify with an Indian nation but who, instead, insisted on being Metis. The price for that insistence is a form of enfranchisement with the extinguishment of

their Aboriginal title, although replaced by a form of treaty right encompassed within federal legislation, in just the same way as occurred with regard to members of Indian nations under the enfranchisement legislation already described.¹⁴⁵

From this perspective, all persons of mixed ancestry would initially have been viewed as falling under federal legislative jurisdiction under section 91(24). Some would have taken treaty as members of Indian nations, with the Red River Metis, and others subsequently under the *Dominion Lands Act*, being offered Hobson's choice under the *Manitoba Act, 1870* - taking the individual land grant and henceforth being considered as outside federal legislative (but not constitutional) jurisdiction. The provisions in the *Indian Act* allowing treaty "half-breeds" to leave treaty and take scrip would have been mere extensions of the original policy and totally in keeping with the tenor of the times, which favoured restricting access to Indian status in order to minimize long-term federal financial obligations. Whether that strategy has been successful is another story, however.

The treaty-making and legislative history already referred to would support this interpretation. Persons of mixed ancestry were treaty beneficiaries under the Robinson and subsequent numbered treaties, and in at least one instance they entered an Indian treaty by way of adhesion as a separate group designated as "half-breed". Their right to reside on land reserved for Indian use and occupation in the pre-Confederation Canadas and the post-Confederation Dominion of Canada was acknowledged by legislation. The statutes and orders in council enacted to deal with the Metis in the West referred to their right as flowing from "Indian Title" or by virtue of their "Indian blood". The extinguishment of Aboriginal title was accomplished through the issuance of "half-breed" scrip at precisely the same time and place as treaty signatories were enumerated and often as part of the same

process. Later, treaty beneficiaries were encouraged to leave treaty in exchange for scrip in the same way as other Indians were encouraged to become enfranchised and to leave reserves in exchange for a similar right to live on allotted land free of federal regulation and restrictions on alienability.

Moreover, and to jump ahead a number of decades, subsequent federal practice has been to recognize that persons of mixed ancestry may participate in modern land claims settlements such as the James Bay and Northern Quebec Agreement, the Gwich'in Land Claim Settlement and those currently under negotiation or awaiting legislative confirmation in the two northern territories,¹⁴⁶ without distinction as to benefits. In fact, many of the Metis persons covered by some of the northern comprehensive claims settlements are descendants of persons who received scrip under Treaties 8 or 11. If anything, then, it would seem as if a conclusion opposite to that of Schwartz might reasonably be drawn: federal policy, practice and legislative intent show that mixed-blood persons generally and the Metis Nation of the West have always been dealt with in the final analysis as possessing 'Indian title' on the basis that they were 'Indians' in a constitutional sense and in the sense of being indigenous people rather than Europeans.

Both Flanagan and Schwartz level another argument against the view that Metis are constitutional Indians. They distinguish the Red River Metis from those Metis living as members of Indian nations. The former are viewed by them as being somehow less 'Indian', because many of them lived and worked around the Hudson's Bay Company more or less as the Europeans did and because their buffalo hunting was for profit, not for subsistence. Their comments are supported by some of the historical materials to which Lussier¹⁴⁷ refers. Observers in the nineteenth century noted that many among the Red River Metis were extremely well educated and that their customs and manners often bore

more resemblance to those of Europeans than to those of the surrounding Indian nations. By any standard, for example, Cuthbert Grant and Louis Riel were both well educated and well travelled men for those times.

This view of Indianness is what Sally Weaver refers to as "the hydraulic Indian" - the Indian as a cylinder filled with pure Indian culture but that empties over time through accommodation to non-Indian values until there is not enough left to justify being considered 'Indian'.¹⁴⁸ Catherine Bell deals with the arguments of Flanagan and Schwartz as follows:

The difficulties with these arguments are the assumptions that there is a single aboriginal way of life and the treatment of the Red River Metis culture without reference to its native origins. Extremely different pictures of the Metis culture emerge if one emphasizes their maternal native ancestry: Metis arts and crafts; unique languages such as patois, Michif and Bungi; the introduction of unleavened bread (bannock); the dependence of the community on the buffalo hunt, hunting and fishing; and the adoption of the dances of the plains Indians in the form of the Red River jig. Like other aboriginal groups, the Metis combined the culture of their native ancestors with that of the European colonizers in order to survive political, social, and economic changes introduced by the "whiteman". The main distinction between the Metis culture and other aboriginal cultures is that historic and contemporary Metis culture descends from both the native and European cultures in a hereditary sense.¹⁴⁹

The "hydraulic Indian" view of Indianness fails to account for the phenomenon of adaptation by Indian nations to the presence of non-Indian society around them. Catherine Bell cites the example of the Cherokee Nation of Georgia (and later Oklahoma), which developed governmental and judicial institutions closely resembling those of the United States, an alphabet and an economy based on agriculture rather than their traditional hunting and gathering. The Cherokee nonetheless remained and remain to this day 'Indian', despite these and subsequent cultural accretions.¹⁵⁰ In fact, both American and Canadian Aboriginal

law recognize that Indian culture is not required to remain frozen in time in order to be considered legitimately 'Indian'. No one can argue that Indian tribes in the United States historically had taxation statutes per se (although wealth was redistributed), for example, as many do now, or that they had corporate business entities or governing institutions based on the doctrine of the separation of powers. Yet these modern developments have not made American tribal nations less Indian - any more than the fundamental influence of aspects of the Six Nations Confederacy governmental system upon American thinkers, including Benjamin Franklin, and the development of the United States have made the latter *more* Indian. In short, Aboriginal peoples have the right to change without giving up their identity.¹⁵¹

This general proposition is directly applicable to the Metis of the prairies, who developed a separate and distinctive culture that was adapted in part from both Indian and European inspirations but was different from both and contained unique elements all its own. The "hydraulic Indian" concept-likewise fails to address the fact that the Metis were culturally distinct, with their own perception of themselves as neither Indian nor white but Metis.

In *Sparrow v. The Queen* the Supreme Court of Canada gave a strong indication that Aboriginal and treaty rights under the Constitution will be free to change and evolve.¹⁵² Presumably, the people who exercise these unique rights will similarly be free to change and evolve.

Judicial Commentary on the Debate

There is to date no higher court decision dealing directly with whether Metis are Indians within the meaning of section 91(24). One 1981 lower court decision from Saskatchewan, *R. v. Genereaux*,¹⁵³ discussed below, touches on the issue in an unconvincing way. A number of

decisions dealing with who is an Indian in the context of the *Indian Act* rather than section 91(24) are also generally relevant because of the light they shed on the overall issue, and they will be discussed first.

One line of cases is in reference to the former prohibition in various versions of the *Indian Act*, in force until repealed in 1985, against selling liquor to Indians. In *R. v. Howson*,¹⁵⁴ an 1894 decision of the North-West Territories Supreme Court sitting *en banc*, the only question submitted to the Court was whether a band member of mixed ancestry to whom liquor was sold was an Indian for purposes of the liquor prohibition in the 1886 *Indian Act*.¹⁵⁵ For the Court, Mr. Justice Wetmore held that such a band member was indeed an Indian. In holding that the reference in the definition section to "any person of Indian blood" must "mean any person with Indian blood in his veins, and whether that blood is obtained from the father or mother",¹⁵⁶ Wetmore J. entered into a lengthy discussion of the question whether "half-breeds" were generally included within the *Indian Act* definition. On the one hand, he viewed Parliament's intention in enacting the *Indian Act* in a manner that confirmed the interpretation that, in order to be considered to be Indian, mixed-blood persons must be members of an Indian nation or band:

It is intended to apply to a body of men who are the descendants of the aboriginal inhabitants of the country, who are banded together in tribes or bands, some of whom live on reserves and receive monies from the Government, some of whom do not. It is notorious that there are persons in those bands who are not full blooded Indians, who are possessed of Caucasian blood, in many of whom the Caucasian blood very largely predominates, but whose associations, habits, modes of life, and surroundings generally are essentially Indian, and the intention of the Legislature is to bring such persons within the provisions and object of the Act, and the definition is given to the word "Indian" as aforesaid with that object.¹⁵⁷

However, Wetmore J. also appears to include other mixed-blood persons as such, noting that "possibly the Act goes farther than I stated, and in some of its provisions applies to half-breeds...".¹⁵⁸ He refers to section 111 of the Act, which makes it an offence to incite "Indians, non-treaty Indians or half-breeds", concluding that the reference is necessary to capture those persons of mixed ancestry who would not be caught by the definition of Indian or non-treaty Indian but who must also be included within the ambit of the Act. These would be persons of mixed ancestry who are not "reputed to belong to a particular band" or who do not "belong to an irregular band" or who do not follow the "Indian mode of life" under the various *Indian Act* definitions.

Thus, for Parliament to enact a provision under the *Indian Act* that "applies to half-breeds", such persons must fall under the same head of authority under which the Act itself has been passed, unless the jurisdiction to do so could be grounded in some other head of power. None other than section 91(24) of the *Constitution Act, 1867* seems to be suitable.¹⁵⁹ In this same vein, Wetmore J. goes on to note that the reference to half-breeds in Manitoba who have received land under the *Manitoba Act, 1870* must also fall within the *Indian Act*, for otherwise there would be no need to exclude them:

So by section 13 of the Act, "no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian." Nor under the same section shall the half-breed head of family anywhere with certain specified exceptions under certain specified circumstances be considered an Indian. The very provisions of this section which I have mentioned show it was the intention of the Legislature that there are half-breeds who must be considered Indians within the meaning of the Act; because if the word "of Indian blood" in paragraph (h) of section 2 meant "of full Indian blood," then these provisions in section 13 were entirely unnecessary.¹⁶⁰

Howson was followed by *R. v. Mellon*,¹⁶¹ where a similar issue arose regarding a man known to be a 'half-breed', fluent in English,

well dressed in the manner of 'white men', and employed outside any Aboriginal community. He was nonetheless held to be an Indian within the meaning of the *Indian Act* on the basis that he had taken treaty some fifteen years earlier. In other words, despite not adhering to a traditional 'Indian' lifestyle, a person of mixed Indian and white ancestry, having once been viewed as an Indian within the meaning of the Act, remained one. In *R. v. Verdi*¹⁶² the same issue arose with respect to a person of mixed ancestry who, having been raised on a Micmac reserve, subsequently received no moneys from the band and had lived and worked in a non-Indian community for two years. He, too, was held to be an Indian under the Act for purposes of the liquor prohibition.

A more restrictive approach to defining the term Indian has been taken in a line of cases dealing with the treaty-guaranteed hunting rights of Indians in Alberta, Saskatchewan and Manitoba. These rights were consolidated and merged by the Natural Resources Transfer Agreement of 1930.¹⁶³ The wording in the implementing federal legislation for Saskatchewan, for example, reads as follows:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which said Indians may have a right of access.¹⁶⁴

The wording in the other implementing acts is similar and provides at least a partial exemption for Indians from restrictions under the appropriate provincial game or wildlife act.

The first case of interest is *R. v. Pritchard*,¹⁶⁵ a Saskatchewan Magistrate's Court decision in which a non-status Indian charged with hunting without a provincial licence sought the benefit of the exemption

for Indians in the provincial *Game Act*.¹⁶⁶ The father of the accused "gave evidence that he was a Cree Indian, his wife was a Cree Indian, his parents were Cree Indians, his son, the accused was born on an Indian reserve and that he and his family had always been known as Indians."¹⁶⁷ Upon reviewing *Re Eskimos*, Policha J., focusing on the issue from the perspective of who was viewed as an Indian in 1867, rejected the *Indian Act* definition and found the accused not guilty because he was an Indian within the meaning of section 91(24).

The *Indian Act*, for administrative purposes and to exercise control over a certain group of people restricts the definition of the term "Indian" for that purpose.

In my opinion this restrictive definition does not apply to all persons and their descendants of the race and class of people known as "Indians" at the time of the *British North America Act*.¹⁶⁸

Upon appeal, the Saskatchewan District Court indicated that the *Indian Act* definition must be controlling but affirmed the acquittal because it believed that the accused was entitled to be registered under the Act and was therefore an Indian in law.¹⁶⁹

In *R. v. Laprise*¹⁷⁰ the Saskatchewan Court of Appeal was called upon to decide whether the accused, "a native of Chipewyan origin [who] lives in a predominantly Chipewyan community"¹⁷¹ (not a reserve) could benefit from the same exemption for Indians in the provincial game act. The accused was a non-status Indian, being neither registered nor registrable as an Indian under the *Indian Act*. For the Court, Woods J.A. stated that the intention of the drafters of the Natural Resources Transfer Agreement was that the term Indian meant the term as defined in the version of the *Indian Act*¹⁷² of the time, and that "[t]his interpretation would exclude persons not entitled to be registered as Indians."¹⁷³ This is an unusual finding, because the version of the *Indian Act* at the time of the signing of the Natural Resources Transfer

Agreement contained a definition of Indian that made no reference to registration. Furthermore, this interpretation results in a definition of a constitutional term being set by Parliament, which the courts generally retain as within their own jurisdiction and beyond the authority of Parliament to do, and freezes the meaning of this constitutional language as the *Indian Act* stood in 1927, despite the prevailing jurisprudence that the Constitution is always to be given a modern interpretation. Although justifiably criticized, this decision has been followed in Saskatchewan.¹⁷⁴

The same issue arose in *R. v. Genereaux*¹⁷⁵ with respect to a person of mixed blood whose "family were half-breeds but had lived on the reserve and adhered to the same lifestyle as the treaty Indians resident there for three generations."¹⁷⁶ The accused was not entitled to be registered under the *Indian Act* and was referred to by the judge as "Metis". The case contains an involved (and sometimes confused) discussion of the meaning of the word Indian. One defence raised appears to have been that Parliament cannot detract from its full jurisdiction under section 91(24) of the *Constitution Act, 1867* by defining Indian in the *Indian Act* in a way that narrows the scope of the term for purposes of the exemption from hunting regulations under the Saskatchewan legislation implementing the Natural Resources Transfer Agreement.

Ferris J. of the Saskatchewan Provincial Court thus addressed his mind to whether the Metis were included in 1867 within the term Indian as used in section 91(24). He refers to the Hudson's Bay materials discussed in *Re Eskimos* as well as to Chartier's article¹⁷⁷ and to the 1868 federal legislation described above,¹⁷⁸ concluding that "the word 'Indian' in the *B.N.A. Act, 1867*, in all probability means pure blooded aborigines or the descendants thereof."¹⁷⁹ (Presumably, then, all the

"descendants thereof" must also be "pure-blooded aborigines" to use the phraseology of Judge Ferris.) The reasoning is somewhat difficult to follow but appears to boil down to the proposition that Parliament made a policy decision unrelated to its jurisdiction under section 91(24) to vest certain persons of mixed ancestry with special rights. The constitutional source of such authority is undescribed. The following passage gives the flavour of the reasoning:

In any event it is clear that even as far back as 1868 the federal government in its own statutes distinguished between "Indians" and others whom it chose to vest with certain rights, in that case to land....It is clear that even in 1868 the federal government felt it necessary to spell out that certain persons, who presumably would not otherwise be seen to be "Indians" were to be treated as such. That does not make the beneficiaries of that policy "Indians" within the meaning of the *B.N.A. Act, 1867*, any more than do subsequent definitions over the years in the *Indian Act*.¹⁸⁰

A policy to include non-Indians within a legislative scheme available only for Indians must find its authority somewhere. If Parliament has jurisdiction only over "pure blooded aborigines" in 1867, as Ferris J. concludes, then the question naturally arises as to how it was able to bring mixed-blood persons within the *Indian Act* in the "subsequent definitions over the years" to which he refers. The better view seems to be that if Parliament has chosen to view persons of mixed blood as Indians under federal Indian legislation, it must have brought them within federal jurisdiction using its authority under section 91(24) over "Indians", for otherwise it would have no constitutional power to declare those persons to be Indians. By the same reasoning, absent a power based on blood quantum (and, by extension, affiliation to blood quantum through adoption or marriage in the case of white women marrying Indian men), Parliament would not be able to do what it has done through the years in the various versions of the *Indian Act* unless,

perhaps, through the application of the necessarily incidental doctrine. The only alternative explanation would be that Parliament acquired its jurisdiction to so legislate through another head of power, such as the royal prerogative or its authority to advance peace, order and good government. In any event, if pure blood is the criterion, then a large number of current status Indians would be outside the legislative jurisdiction of Parliament, and the amendments in Bill C-85 would probably be unconstitutional, as would much of the former regime for determining eligibility for registration.

A fishing case in the Northwest Territories addressed a similar issue. In *R. v. Rocher*¹⁸¹ the federal *Fisheries Act*¹⁸² Regulations providing an exemption from licensing for an "Indian, Inuk or person of mixed blood"¹⁸³ were challenged on the basis they offended the *Canadian Bill of Rights* for discrimination on account of race. In upholding the regulation, Ayotte J. of the Territorial Court considered the basis upon which Parliament had passed the regulation, ultimately deciding that the exemption was an attempt to preserve certain special historical rights accruing to Aboriginal people. He found the basis to be the power in section 91(24) over "Indians". The facts relied upon by Chartier in his article analyzing the Hudson's Bay materials convinced Ayotte J. that "half-breeds" were indeed considered "Indians" in 1867 and were therefore susceptible to special treatment by the federal government on that basis along with ethnological Indians and Inuit.¹⁸⁴

Another recent consideration of this issue is by the Ontario District Court. In *The Queen v. Thomas Chevrier*¹⁸⁵ a non-status Indian descendant of a signatory of the Robinson-Superior Treaty sought to exempt himself from provincial hunting regulations under the treaty-protected hunting right guaranteed to his ancestors. The accused was a member of an Indian community, the unregistered Blackwater Band, and was not registered under the *Indian Act*. It is not stated whether he was

registrable under the Act. He was acquitted by Wright J. on the basis that the province had no power to interfere with treaty rights originally guaranteed by the Crown to Indians. It is not entirely clear whether the judge considered Chevrier himself to be an Indian as well, although, but for the closing words of the passage below, that would certainly be the logical inference to be drawn from the decision:

This accused has inherited the right to hunt granted to his ancestors.

Whether the accused is an "Indian" within section 91(24) of the *Constitution Act, 1867* I need not say. The accused claims a birthright granted by the Crown in exercise of its jurisdiction over Indians, and the province, having no jurisdiction over Indians as such, has no power to take away a right originally granted to Indians even though the present holder of that right may not be an Indian.¹⁸⁶

It may be that Wright J. used the term Indian the last time in the sense of not being registered or registrable under the *Indian Act*.

There is also the recent decision of the Manitoba Provincial Court in *R. v. McPherson*¹⁸⁷ dealing with whether Metis hunters have an Aboriginal hunting right protected as such under section 35 of the *Constitution Act, 1982*:

Both of the accused have Aboriginal blood coursing through their veins but are not and nor are they eligible for treaty Indian status. They call themselves Metis and allege that because of that ancestry they have a common law Aboriginal right to hunt. They further allege that the provisions of the *Wildlife Act*, R.S.M. 1987, c. W130 in question are not applicable to them.¹⁸⁸

The evidence showed the two accused to be in a similar situation to that of status Indians living under treaty in the same part of Manitoba.

Gregoire J. characterized them as "fringe Metis, i.e., people of mixed blood who live in areas adjacent to remote Indian reserves and who in large measure have retained a traditional lifestyle close to the land..."¹⁸⁹ They both spoke Cree as their first language and had been raised around treaty Indians, and one had received what formal

education he had in school with treaty Indian children. They were shown to be reliant "to a significant extent upon their hunting, fishing and gathering skills or those of their extended family for their survival."¹⁹⁰

After reviewing evidence about the origins of the Metis, the judge concluded that "today's Metis could be someone with some North American Aboriginal blood who holds himself out as such".¹⁹¹ He noted the discretionary practice of conservation officers to treat Metis hunting rights in fact similarly to those of treaty Indians. Although the Metis could not fully satisfy the criteria for establishing Aboriginal rights to which the court referred¹⁹² in Judge Gregoire's view, he was nonetheless prepared to find the existence of Metis Aboriginal rights largely, it seems, because of the Indian lifestyle and Indian ancestors of today's Metis. Throughout his analysis he refers to a "lifestyle very similar to that of the treaty Indian next door",¹⁹³ to the "conventions adopted whereby clearly certain Metis people hunted in certain areas to the exclusion of the treaty Indian population,"¹⁹⁴ to their "joint possession of the land with other Aboriginal groups,"¹⁹⁵ and to the fact "that some of their antecedents, that being the Indian ancestors, in fact, had occupied some of the territories in question from time immemorial."¹⁹⁶ Thus, Gregoire J. concluded as follows:

I am prepared to hold that the accused persons in fact did have an Aboriginal right notwithstanding the deficiencies which appear apparent in the classical analysis of their Aboriginal rights. I arrive at this conclusion on the basis that there was at least a minimal degree of compliance with the old criteria, and that the rights claimed in this case are the minimal usufructuary rights. I find that in such circumstances, if the Metis defendants can establish an unbroken chain of such use of the land by their ancestors for a reasonable period of time then that is sufficient for the right to exist.¹⁹⁷

Finally, there are the recent decisions of the Alberta Provincial Court in *Ferguson*¹⁹⁸ and the New Brunswick Provincial Court in *Fowler*.¹⁹⁹

The former involved a charge against a Metis for hunting for food without a licence and unlawful possession of wildlife (moose) contrary to the *Wildlife Act*,²⁰⁰ while Mr. Fowler was a non-status Indian charged with possession of a firearm in a wildlife area without a provincial hunting licence. Interestingly, the latter was accompanied by two status Indians who were partaking in the same activity but who were not charged, even though the province had previously been resisting the general assertion of Aboriginal and treaty rights by Maliseet Indians.

Judge Goodson in *Ferguson* concluded that the primary issue before the Court was whether the accused was entitled to the defence available to "Indians" under section 12 of the Natural Resources Transfer Agreement (NRTA). Although Mr. Ferguson spoke only Cree until attending school, lived in a Cree-speaking community in northern Alberta, and regarded himself as a "Cree Indian",²⁰¹ he was not eligible for registration under the current *Indian Act* or the 1951 version, as his paternal great-grandparents were Metis who had accepted scrip while his maternal grandparents were treaty Indians who later took scrip. The question became, then, whether the NRTA confirmed harvesting rights solely for registered Indians, or whether the term used therein should be given a more expansive interpretation so as to include Metis and "non-treaty Indians", by which the Court meant both non-registered Indians today and the term that existed in the *Indian Act* at the time the NRTA came into force until the Act was revised in 1951. Judge Goodson expressly rejected the conclusions of the Saskatchewan courts on this matter reached in the 1970s as being wrongly decided.²⁰² Instead, he determined that the NRTA must have meant to use the term Indians as including both treaty and non-treaty Indians who are harvesting for food within the boundaries of the province. After

quoting from *Sparrow* at some length, Judge Goodson emphasized the Supreme Court's view that section 35(1) holds "the Crown to a substantive promise".²⁰³ He then concluded by asking what this "substantive promise" might mean in the case of the Metis and stating that

It is difficult to imagine a more basic Aboriginal right than the right to avoid starvation by feeding oneself by the traditional methods of the community.²⁰⁴

Although decided one month earlier and reported later, Judge Clendening in *R. v. Fowler* faced a somewhat similar set of circumstances but without the application of the NRTA. The judge also had to determine whether a person who was not eligible for registration as an Indian but who self-defined and was recognized by others as such was entitled to exercise harvesting rights on the same terms as registered Indians. Judge Clendening examined *Re Eskimos* and determined that the courts should be fair and liberal in interpreting treaty rights and not impose an impossible burden upon an Aboriginal person to prove his or her aboriginality. The Court was satisfied from the extensive documentary and oral evidence that the defendant was a descendant of and had a substantial connection to the Maliseet Nation, who were beneficiaries of pre-Confederation treaties containing the right to hunt. Clendening J. concluded that subsection 35(1) of the *Constitution Act, 1982* affords constitutional protection against the restrictive exercise of legislative powers to all Aboriginal peoples and not merely status Indians. The issue of floodgates was addressed, but the Court concluded in light of *Chevrier*²⁰⁵ that this would not be a problem, as any person who can "prove a substantial connection to a signatory of the treaty in question"²⁰⁶ is entitled to the benefit of the rights contained in that treaty.

From the foregoing cases it can easily be seen that the courts have themselves had no small amount of difficulty grappling with the question of when and under what circumstances Metis Nation members and other mixed-blood persons are to be considered 'Indians' within the narrow meaning of the *Indian Act* or for constitutional purposes. It should be noted in this regard that the courts have primarily been attempting to fit people of mixed ancestry into the category of Indians so as to apply the existing body of law that has been settled concerning registered Indians.

If there is one common element in the judicial consideration of these issues, it is the ambiguity apparent in the analyses. Sometimes and for some purposes Metis persons will be considered Indians if there is some actual connection with an Indian nation, band or treaty signatory. For other purposes no amount of connection, apart from falling within the strict legal definition, will do. One thing, however, does seem clear: wherever mixed Indian and non-Indian blood is present, the courts have doubted neither the validity of beginning their analysis on that basis nor the constitutional competence of Parliament to assert jurisdiction in relation to such persons. The argument, if it arises at all, which it does not in some cases, has instead usually been about the extent to which that jurisdiction has been reflected in particular pieces of legislation, such as the *Indian Act*.

It must also be said that the Canadian courts have yet to confront directly the issues of Aboriginal and treaty rights, including rights to land, natural resources and self-determination, that arise within the context of Metis people and their unique legal rights.

THE CONSTITUTION ACT, 1982 AND BEYOND

Federal Policy: Metis Come To The Table

With the distribution of Metis land under the *Manitoba Act* and the *Dominion Lands Act*, and with the ever more restrictive definition of 'Indian' that appeared in successive versions of the *Indian Act*, the position of the federal government over time became that both non-status Indians and Metis were a provincial and not a federal responsibility. The erosion of that position began in the 1970s in the aftermath of the disastrous 1969 white paper²⁰⁷ when the federal government undertook to provide core funding for the main national status Indian organization, the National Indian Brotherhood (NIB). Soon that funding was extended to the organization representing non-status Indians and Metis, the Native Council of Canada (NCC). Additional federal funding was subsequently provided to the NCC for housing and land claims research, and from 1978 to 1980 the NCC was part of a joint NCC/federal cabinet committee structure modeled to some extent on the joint NIB/federal cabinet committee that was operative between 1974 and 1978. As mentioned, non-status Indians and Metis persons participated as beneficiaries in the land claims settlement in the James Bay and Northern Quebec Agreement in 1975 and have more recently been distinct participants in the negotiation of land claims settlements in the Yukon and in the Mackenzie Valley region of the Northwest Territories in conjunction with First Nations.

The view that the Metis were entitled to some kind of equivalency with those clearly included as section 91(24) 'Indians' who were represented by ethnological Indians and Inuit was reflected in the 1979 report of the Pepin-Robarts Task Force on Canadian Unity, *A Future Together*. It called for the involvement of Aboriginal people in the process of constitutional renewal: "provincial and federal authorities

should pursue direct discussions with representatives of Canada's Indians, Inuit and Metis with a view to arriving at mutually acceptable constitutional provisions that would secure the rightful place of native people in Canadian society."²⁰⁸

The three national Aboriginal political organizations of the day (NIB for status Indians, NCC for non-status Indians and Metis, and the Inuit Committee on National Issues (ICNI) representing the Inuit) were invited by the federal government to attend two first ministers' meetings as observers in October 1978 and February 1979. They pressed for more direct involvement with some success, as in 1979 and again in 1980 the NIB was promised a full and equal role in the process of constitutional reform on issues affecting their constituency of status Indians. All three national political parties endorsed these promises, and the federal government subsequently extended it to include the Inuit, non-status Indians and the Metis. The three organizations were then at the table in four first ministers' conferences in 1983, 1984, 1985 and 1987, as well as literally dozens of meetings at the ministerial and senior officials level to deal with the many outstanding Aboriginal issues that had arisen during the protracted constitutional renewal process.

Prior to the 1983 conference, the Metis National Council was formed as a result of the withdrawal of the three prairie province affiliates from the NCC (new groups were later formed in western Ontario and British Columbia) to form a separate vehicle that drew its inspiration from the Red River Metis to represent prairie Metis interests.²⁰⁹ At the first ministers' meetings, Metis were therefore represented by two organizations, the NCC and the MNC, divided along geographical lines. There was, however, a fundamental difference in the philosophy of the MNC and the NCC that went beyond geography. The MNC asserted that the Metis in the Red River were not merely people of mixed ancestry who had developed a separate identity but that they had

become a distinct people who formed the Metis Nation, with their own independent entitlement to land and self-determination unconnected to their Indian ancestry.

Following this first meeting, the major unresolved issue was self-government. The subsequent first ministers' conferences in 1984, 1985 and 1987 failed to produce agreement on this issue, and it remains unresolved in both a political and constitutional context.

The Meech Lake Accord did not directly refer to Aboriginal issues except through a notwithstanding clause (despite Aboriginal demands over three years for substantive constitutional amendments). Its failure in 1990 has been attributed at least in part to the belief of Aboriginal people that their expectations with respect to participation in constitutional conferences had not been met.²¹⁰ The 1990 joint proposal from three of the four major national Aboriginal political organizations (AFN, NCC and Inuit Tapirisat of Canada (ITC)) to the Special Committee of the House of Commons on the Proposed Companion Resolution to the 1987 Constitutional Accord (the Charest Committee) clearly demanded a full, ongoing role in future constitutional discussions as of right and on the same footing as the provinces. This submission also made it clear that these national Aboriginal organizations viewed all constitutional amendments as important to Aboriginal people, not solely amendments that specifically mention Aboriginal people, as any amendment could affect their economic interests, legal rights or political influence. The MNC did not participate in this submission as it chose to endorse the Meech Lake Accord on the basis of a commitment from Prime Minister Mulroney that he would address Aboriginal constitutional reform as soon as this Accord was proclaimed and would also respond seriously to the Metis Nation demand for land and self-government. The MNC was, of course, supportive of the general thrust of the position taken by the other

organizations in the sense of also wanting full participation in all future constitutional negotiations along with seeking significant changes to the Constitution of Canada.

As is now well known, following intense lobbying by AFN, ITC, MNC and NCC, these four organizations were ultimately invited to participate on an equal basis with the federal and provincial governments during the Charlottetown Accord process as of March 12, 1992. The Native Women's Association of Canada sought similar involvement, but this was denied by the federal government, resulting in several court cases in which they obtained a declaration that they had been discriminated against by their exclusion,²¹¹ although this judicial victory was achieved after the negotiation process had been concluded.

The draft Political Accord accompanying the legal text of the official Charlottetown Accord provided for the continuation of the section 37.1 requirement that Aboriginal peoples participate in constitutional discussions on items affecting them (Part 5, 5.1); the establishment of a Ministers/Leaders Forum involving the leadership of the four Aboriginal organizations to work over the subsequent months to develop a negotiating framework (Part 9, 9.1-9.4); and a system for dispute resolution as an alternative to the courts.

The 'best efforts' legal draft of the actual Accord would have created a Canada clause that recognized the Metis as one of the first peoples: "the Aboriginal peoples of Canada, being the first peoples to govern this land..." (cl. 1). In addition, subsection 35(2) would have been repealed and re-enacted (with 'Aboriginal' capitalized), thereby reconfirming the separate listing of the "Indian, Inuit and Métis peoples" (cl. 28(2)). In addition, the Accord would have recognized the inherent right of self-government of the Metis along with the Indian and Inuit peoples (cl. 29). Most important for this paper, the Accord would have added an amendment (as *Constitution Act, 1867*, s. 91A) for greater

certainty regarding section 91(24) to confirm that it applies to "all the Aboriginal peoples of Canada" (cl. 8).

In addition, the Metis National Council negotiated a further document as part of this process called the Metis Nation Accord. This latter Accord was proposed as a formal agreement between the Metis Nation of Canada, as represented by the MNC and its affiliates, and the Queen in right of Canada as well as in right of the five western-most provinces along with the government of the Northwest Territories. The purpose of the Accord was to supplement the provisions agreed to by all first ministers and Aboriginal leaders in the package of constitutional amendments and political commitments reached with a focus directly upon the wishes of the Metis Nation. The Accord contained commitments of resources to permit the enumeration of the Metis Nation and to develop a registry under its control. It also required the parties to negotiate tripartite self-government agreements that would include issues regarding "jurisdiction" and "economic and fiscal arrangements" (cl. 3(a)). The government parties also agreed, "where appropriate, to provide access to land and resources" (cl. 4(a)) as well as transfer payments to Metis self-governing institutions (cl. 9).

The Accord was intended to be a legally binding agreement among its parties and to be ratified through enabling legislation to be passed by Parliament and the respective legislatures once the Constitution had been amended in accordance with the agreements contained in the Charlottetown Accord. Although the latter was rejected in a referendum, the MNC has continued to request that the governments involved in the negotiation of the Metis Nation Accord formally sign it and take action to implement all those of its provisions that were not dependent upon the proposed constitutional reform package being accepted. At the time of writing this paper, it appears that the government parties are continuing to refuse to accede to this request;

however, Premier John Savage of Nova Scotia, in his capacity as chair of the annual premiers' conference, promised the MNC on August 26, 1993 that he would write to the governments concerned urging them to respond to the MNC on this matter.

The inherent right of self-government of the Aboriginal peoples has been discussed both within and outside the Charlottetown process. While a constitutional amendment was sought by the four national Aboriginal political organizations in order to remove any uncertainty that may exist as to the inclusion of the inherent right within the phrase "existing aboriginal and treaty rights" within section 35(1), they have consistently argued since 1982 that the right is nevertheless "recognized and affirmed" by this constitutional provision. This position has been accepted by a number of provincial governments and endorsed by the Royal Commission on Aboriginal Peoples,²¹² although the British Columbia Court of Appeal has reached a different conclusion in the *Delgamuukw* case.²¹³

It is important to realize that the assertion of an **inherent** right of self-government - as opposed to a mere right of self-government - means that the right exists "as a permanent attribute or quality" that is "an essential element" or "intrinsic".²¹⁴ In other words, the right has been inherited from previous generations who also possessed this right. It "inheres" as a result of the extra-constitutional status of a people whose self-governing powers derive from their existence as a social organization structured as a distinct sovereign polity. In this case, the right is pre-constitutional in the sense that it is derived from a source that arose before Confederation in 1867 rather than being created by the Canadian Constitution. The concept of the inherent right of self-government, therefore, speaks to a particular category of self-government in that its ultimate origin is described as being separate and apart from positive law. In this regard, the Aboriginal position can be

contrasted with the position of 'peoples' generally who, in international law, have a right of self-determination,²¹⁵ which is not articulated as dependent upon the presence of inherency.

If the inherent right is recognized in the Metis, it could only be because they too were organized outside of and prior to the Canadian Constitution. The preamble of the Metis Nation Accord implies this position, stating that "in the Northwest of Canada the Metis Nation emerged as a unique Nation with its own language, culture and forms of self-government". More generally, the emphasis by the MNC on the Metis Nation as being born in the Red River Valley prior to 1867 demonstrates a distinct social and political existence that pre-dates the Canadian Constitution. Metis in eastern and central Canada have tended instead to underline their Indian ancestry and their subsequent existence as distinct communities, since ethnological Indian and Inuit political entities clearly share the characteristic of possessing an inherent right.

All Metis are, of course, constitutional Indians under section 91(24). Logically, it becomes difficult to argue that the recognition of Metis inherent rights is different than the recognition of the same right in the other two groups, when the only difference is a federal policy, developed at some point after Confederation and prior to 1982, of refusing to accord them the same constitutional status. Perhaps that is why the federal government was prepared finally in 1992 to accede to this logic and to amend section 91(24) to include all the Aboriginal peoples. The federal government has apparently redefined its position after the public's rejection of the Charlottetown Accord, as it has on the Metis Nation Accord, by indicating that its willingness to move on these matters was integrally tied to action on the constitutional reform package, such that the defeat of this package means it has returned to its prior position of denying recognition to the Metis as coming within s. 91(24) and the inherent right as already being protected by s. 35(1).

The particular issue concerning the constitutional status of the Metis did not disappear with the rejection of the Charlottetown Accord on October 26, 1992. The MNC has continued to seek adoption of its Metis Nation Accord while also pursuing the alternative strategy of a constitutional reference on their inclusion in section 91(24). The MNC has in addition drafted its own Constitution for the Government and People of the Metis Nation, which is currently under internal consideration.

So what can be made of the political developments and agreements reached in 1992? Do they represent a mere policy decision by the federal government to treat Metis as equivalent to constitutional Indians because of a non-binding and non-legally induced desire to appear to be fair? Was this simply part of the price that Prime Minister Mulroney and his cabinet colleagues were prepared to pay in order to obtain Aboriginal support for constitutional reform that included other issues of importance to the federal government? Or can they be taken to show that there is at least a vestigial recognition by the federal government that, for constitutional purposes, there is really no difference between Metis and the two groups representing the already formally recognized constitutional Indians? That debate cannot be resolved here. It can only be observed that it would be quite strange after all this if the federal government were to declare that Metis are constitutionally unlike ethnological Indians and Inuit concerning section 91(24) when for the vitally important constitutional purpose of establishing a third order of Aboriginal government within the Canadian federation it has treated all three Aboriginal peoples on an equal footing.

Subsection 35(2): The Indian, Inuit and Métis Peoples

On April 17, 1982 section 35 was enacted, reading as follows:

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

This section was amended in 1984 as a result of the agreement reached at the 1983 first ministers' conference to add subsections (3) regarding land claims agreements and (4) concerning equality between the sexes with respect to subsection (1) aboriginal and treaty rights. As mentioned above, the federal government was prepared to repeal and then immediately to re-enact section 35 (capitalizing the A in aboriginal). Significantly, the inclusion of the Métis as such in subsection (2) remains the first national legal usage of this term.²¹⁶

The *Constitution Act, 1982* does not exist in a political and social vacuum. It is isolated neither from the events that brought it into being nor from the other constitutional instruments with which it makes up the Constitution of Canada. One such instrument is evidently the *Constitution Act, 1867*. Although neither the political nor constitutional antecedents can be determinative of the interpretation to be placed on particular provisions, neither can they be ignored.

Thus, it seems as if logically there are three possible approaches to the interpretation of subsection 35(2) and its reference to the "Indian, Inuit and Métis peoples of Canada":

1. It has no necessary connection with its constitutional predecessors and should be understood only in respect of the political forces that led to its adoption;
2. While connected to its constitutional predecessors, it refers to different categories of people entirely from those referred to in section 91(24) as "Indians"; or

3. It simply elaborates the categories of people contained in the section 91(24) reference to "Indians" using more modern, precise and respectful language.

Given our closeness in time to the events that led to the advent of the *Constitution Act, 1982* and the continuing political fall-out from those events, it is somewhat appealing to read section 35 entirely separately from the other instruments making up the Constitution. There is no shortage of books and articles by journalists, historians and political scientists explaining the trading of "fish for rights", to use former prime minister Pierre Trudeau's famous expression, and why the trading is still going on. Given the disappointment at the failure of the Charlottetown Accord among the 17 parties involved in the negotiations and by those who supported the amendments, many might find this approach all the more appealing. In our submission, however, this is a cynical view of constitutional law and would serve only to erode further the confidence of Canadians in the integrity and independence of the law from political influence.

Moreover, such an approach would also serve to blur the distinction between legal and socio-historical methods. The Canadian Constitution, although made up of separate documents drafted at different times, is nonetheless a single legal framework against which the national life is measured. It is a fabric and not a tangle of separate threads. Section 52, after all, refers to the "Constitution of Canada" in the singular. To go outside the corners of the Constitution to place great weight on evidence in the debates, meetings and public consultations of legislative intent is to reduce constitutional law to social science. This is particularly inappropriate when a constitution is drafted intentionally to be a durable and living document capable of speaking to a changing present. The socio-historical approach would require judges to concentrate on the political events reflected in such a body of material

at the point in time at which these events occurred. This would freeze a certain view of things. Just as there are no frozen rights, there can be no frozen interpretations of constitutional provisions. This approach might also require judges to respond in the way that a legislature would – to second-guess the legislature in effect – by asking what the politically correct or expedient interpretation ought to be in the political and historical circumstances in which the events occurred.

A political approach leads logically to reading the categories of "Indian, Inuit and Métis peoples" purely in terms of the national Aboriginal political organizations that forced the entrenchment of these categories. 'Indian', for example, could be seen as merely responding to the NIB, such that the term could refer only to the NIB constituency of status Indians. Thus the category 'Métis' would be seen as merely responding to the NCC constituency. That constituency also included non-status Indians. Does 'Métis' thus mean what we knew as two separate categories – non-status Indians and Metis – prior to 1982? In other words, are non-status Indians now Metis for purposes of Aboriginal and treaty rights? If, on the other hand, 'Métis' means only persons of mixed ancestry formerly known as 'half-breeds', then what happens to non-status Indians? Since they were not represented politically by the NIB, does this mean that they do not fall within any category? Are they dependent, then, on amendments such as those in Bill C-31 of 1985 in order to avail themselves of constitutionally protected rights? If so, then the purely political approach leads to the alteration (and amendment, in effect) of constitutional categories by mere legislative amendments. For this and the other reasons mentioned, it is submitted that the political approach is legally inappropriate and unacceptable.

Assuming then that subsection 35(2) is part of the broader constitutional fabric that includes section 91(24), does it introduce a new

legal category unrelated to the category of Indians in section 91(24)? This view finds some support in the different purposes of the two enactments. The latter deals with the division of legislative powers between the two branches of the Crown, centralizing power concerning the pursuit of relations with a racial²¹⁷ and political group in one branch. The former deals with constitutionally protected unique rights. Rights under the Constitution can be held by a broad range of categories of people. It could be argued that those of Aboriginal descent represent merely a sub-group of rights holders, albeit one with a long history and a different constitutional status because of that history.

This argument, however, raises more questions than it answers. In the first place, the distinction between the different purposes of the enactments does not necessarily hold up. Section 91(24) gives power regarding a distinct group of people on what are both racial and political grounds. That group is and was largely defined through having Indian blood in some measure. In other words, Indians were Indians only because of their blood descent from persons whose political and economic organization predated the advent of the political and economic organization represented by the British Crown. At least one of the primary reasons for conferring power upon the federal rather than the provincial level of government regarding this racial group was for the purposes of protection and control, as their original political and economic forms of organization were consciously being displaced or destroyed by the emerging new forms under the aegis of the British Crown. The pre-Confederation legislation of the colonial governments clearly reflected the desire to protect Indian reserve lands from the ravages of white trespassers while at the same time encouraging the development of small Indian farming communities so as to maximize the land available for non-Aboriginal settlement. In the same way, the purpose of section 35 is more or less permanently to protect (through

constitutional means) from further erosion the remaining vestiges of political and economic organization still qualifying as "existing aboriginal and treaty rights" by those mentioned in subsection 35(2). These persons are described as "aboriginal peoples" whose political and economic forms of organization not only existed prior to the arrival of the British Crown but in many cases developed thousands of years before the Crown was established. The only category of persons fitting that description are referred to as "Indians" constitutionally when it comes to section 91(24).

Another argument in favour of the proposition that sections 35(2) and 91(24) should be read separately focuses on the use of the term Métis. As mentioned previously, the 1982 amendments reflect the first use of 'Métis' in a part of the Constitution. From this perspective, the argument follows that the historically familiar and legislatively recognized term 'half-breed', which was used in a constitutional context in the *Manitoba Act, 1870*, should have been used if it was intended to read 35(2) with 91(24). In other words, if the intention were simply to break out the categories of peoples subsumed within the category 'Indians' in section 91(24) and separate them from the other Aboriginal peoples not in section 91(24), the well known terminology would have been employed in the interests of clarity - even though this label had acquired unacceptably racist overtones, was not the description of choice of the people concerned (any more than the Inuit in Canada had selected 'Eskimo' to describe themselves), and had largely disappeared from public and governmental language. The problem with this argument is that subsection 35(2) also breaks out Inuit, who are already constitutional Indians under section 91(24). They are not a new category, nor is their historically familiar and legislatively recognized appellation of 'Eskimos' used. If that is the case, would it not also be the case that 'Métis' was substituted for 'half-breed' in the interests of

modern usage? It is worthy of note that Parliament amended subsection 4(1) of the *Indian Act* to change the exclusion from "Eskimos" to "Inuit" in order to be more culturally and politically sensitive.

It is suggested that it makes more sense to read subsection 35(2) as referring to the same categories of people formerly subsumed within the term "Indians" in section 91(24). The language used - "Indian, Inuit and Métis peoples" - is simply a more respectful way of referring to Aboriginal peoples using the language they employ to describe themselves rather than the sometimes derogatory terms used by others to identify them. Moreover, the listing of the "aboriginal peoples of Canada" is for the purpose of the Aboriginal and treaty rights referred to in subsection 35(1). Historically, only constitutional Indians possessed land on which to exercise the activities now referred to as Aboriginal rights. And only section 91(24) Indians could presumably enter into treaties with the Crown. If Metis are not Indians in this sense, then how would they have acquired the Aboriginal or treaty rights that their listing in subsection 35(2) was supposed to guarantee to them? The reference to these rights in section 35 cannot be empty, because "the courts...are bound to assume that enactments, especially constitutional enactments, do not speak in vain."²¹⁸ The alternative explanation would have to become that section 91(24) is unconnected to federal treaty-making authority and its obligations in relation to Aboriginal title, such that the Metis and the Crown in right of Canada can enter into treaties and land claims settlements, as they have done from time to time since Confederation, even though the Metis are not within the scope of federal jurisdiction concerning constitutional Indians. This is a far less likely or logical interpretation for any Canadian court to make.

IF THE METIS ARE "INDIANS" WHAT ARE THE RAMIFICATIONS?

Are the Metis "Indians" Within Section 91(24)?

Even more than 125 years after Confederation, the answer to the question as to whether Metis come within the sphere of jurisdiction allocated expressly to the federal government under section 91(24) rather than to the provinces remains unanswered. There is no shortage of indications, however, that the Metis are clearly included within the category of constitutional Indians in this subsection. In the first place, there is the evidence of the inclusion of the Metis in the treaty-making process throughout Canadian history. The approach of including Aboriginal people who are neither Inuit or registered Indians in treaties and recognizing that they do have land rights continues up to modern times in the form of comprehensive land claims agreements in northern Quebec and the two territories (which may be followed in the relatively near future in British Columbia and Labrador, where Metis organizations are insisting upon recognition of their distinct rights to territory). The Metis are also expressly included as Metis in the two recent settlements in the Mackenzie Valley.

Some would argue, however, that this is not in itself proof that mixed ancestry was the determining criterion for Indian status under the treaty-making process; rather, it was adherence to an 'Indian' tribe or band as such and following the 'Indian' lifestyle. The response to this is to point to the adhesion to Treaty 3 by "half-breeds", the promise of treaty rights to the Moose Factory Metis in Ontario and the issue of "half-breed" scrip under the *Manitoba Act, 1870* and later under several of the *Dominion Lands Acts*. Scrip was clearly issued by the Crown "towards the extinguishment of the Indian Title",²¹⁹ the scrip commissioners in the North-West Territories travelled with the treaty commissioners, and the date of scrip eligibility was the same as for

treaty benefits. The difference, of course, was that scrip was a method of individual allotment of lands in fee simple as opposed to the communal reservation of lands under the treaties. Even communal and treaty-protected land, however, could be allotted in fee simple under the enfranchisement provisions applying to Indian tribes and bands as such. In addition, Treaty 8 also contained an option for individual allotments for Indian beneficiaries as opposed to the pooling of entitlements to form reserves.

Another argument in favour of federal jurisdiction concentrates its attention upon the legislative history beginning in 1850 and continuing through until fairly recent times under the various versions of the *Indian Act* whereby persons of "Indian blood" associated with Indian tribes or bands have been included on membership lists as Indians. Only some of those persons - those born of a non-Indian father and an Indian mother after 1868 and even then only if the parents were married under provincial law - were automatically excluded from Indian status and reserve benefits. Even this rule has been amended under Bill C-31, and tens of thousands of formerly excluded persons of mixed Indian and non-Indian ancestry have now been restored to Indian status, although not necessarily to band membership. Thus, the legislative practice would seem to indicate that the presence of Indian or Inuit ancestry is the determining criterion for the assertion of federal jurisdiction under section 91(24). Some will argue, and with a fair degree of justification, that this merely shows once again that people of mixed ancestry must be associated with a nation or band of 'Indians' in order to benefit from federal jurisdiction. The answer, of course, is that federal jurisdiction must be based primarily on ancestry, for otherwise Bill C-31 would be unconstitutional. Many of those restored to status under the *Indian Act*, including some who have rights to band membership, have never been associated with an Indian nation or band during their lives, nor do they

intend to be so associated in the future. The scope of the *Indian Act* has not, thus, been limited solely to collectivities with whom the federal government has had a political relationship.

The wording of the *Manitoba Act*, the *Dominion Lands Act*, and the other legislation and orders in council implementing the land grant scheme provides a third argument in favour of federal jurisdiction in relation to the Metis. For the most part, these instruments refer to the extinguishment of Indian title. Two of them, however, do not, as they refer instead to "Indian blood". Since Indian title is held by "Indians", and since "Indians" are persons of "Indian blood", this seems to be less a diminution of the argument than a strengthening of it.

There are those, however, who oppose the notion that Indian title equates with being an Indian and find some degree of support in the historical record of political debates and meetings from the relevant period in Canadian history. The response to this is that if the attitudes of politicians and officials to constitutional responsibilities were determinative, there would be no numbered treaties in the western portion of Canada, no recognition of Aboriginal title or the modern land claims agreements, and, if one group of politicians had been able to have their way in 1969, there would no longer be any 'Indians' at all in Canadian law.

Yet another reason for inclusion of Metis as constitutional Indians under section 91(24) lies in the modern federal practice of treating the Metis as equivalent in constitutional status to the other Aboriginal peoples. Although there is nothing definitive or unambiguous in this, the recognition of that equivalency in section 35 of the *Constitution Act, 1982* - with its reference to Metis as one of the "aboriginal peoples of Canada" whose aboriginal and treaty rights are recognized and affirmed - reinforces the federal practice. It could be argued that the practice of three successive prime ministers in inviting

Aboriginal representatives to participate formally in constitutional amendment discussions since 1982, with even earlier involvement dating back to the Clark government in 1979, has crystallized into a constitutional convention. To the rejoinder that federal practice does not make law, there is really only one response: it may not make law per se, but it provides another body of evidence that, along with the historical and legislative references, leads one closer to the conclusion that federal constitutional jurisdiction is far more likely than not to be endorsed by Canadian courts.

In 1867 the federal Parliament was given jurisdiction regarding the race of "aborigines", to use the wording of the Supreme Court of Canada in *Re Eskimos*, designated by the term 'Indians'. Parliament has asserted that jurisdiction on the basis of race and pursued a political relationship with a population that possesses a unique political status in what is now called Canada, with race defined primarily by the possession of some degree of 'Indian' blood through descent from the indigenous inhabitants of this land. Some persons without Indian blood have also been subject to parliamentary jurisdiction, but in their case it has been through the act of marrying into or being adopted by registered Indians into an existing Indian bloodline with a connection to an historical Indian nation. As Bill C-31 shows, federal jurisdiction continues to be grounded on the basis of some degree of Indian blood. This is so even if the persons over whom such jurisdiction is asserted call themselves Indians, Metis or use the name of their original nation or current local community to describe themselves. Catherine Bell expresses this point well in the context of cultural adaptation by Aboriginal groups in these words:

Given the diversity among historical aboriginal groups and the inevitability of the co-mingling of the aboriginal and colonizing cultures, it is difficult to identify a single common factor linking all the aborigines together as a group other than one: the ability

to trace the descendency of the core of the group to indigenous inhabitants of Canada through maternal or paternal lines.²²⁰

In the final analysis, the job of the courts will be to give a sensible interpretation to the tangled and sometimes unpleasant history of relations between the Crown and the Aboriginal peoples. It is submitted that in light of the facts presented here it is more logical, sensible and efficacious to consider persons of mixed ancestry of all kinds to be within section 91(24) jurisdiction. It is also more feasible for the federal Crown to exercise the treaty-making power and to discharge constitutional obligations to the Metis, as it is this level of government that has such power under current constitutional arrangements. On a balance of historical probabilities, practical convenience, and legal and constitutional logic, and in order to maintain the honour of the Crown, it is submitted that the only reasonable conclusion to draw is that in section 91(24), "Indians" refers to persons of mixed ancestry, whether defined for other purposes as 'Indian', 'Inuit' or 'Métis'. Such a position is also in keeping with the continually stated views of the Metis, whether as represented by the MNC or by the NCC at a national level. This is not to say, however, that the Metis wish to be included within the *Indian Act* or to have the federal government regulate their lives and their rights under separate federal legislation akin to that Act. It is clear, instead, that the Metis wish to define themselves and to obtain recognition for the authority of their own governments, whether within the context of an overall Metis Nation as advanced by the MNC or through more local autonomous forms. The role of the Canadian courts in this regard is not to define the Metis as a people, but to interpret the Constitution of Canada in such a way as to confirm primary federal responsibility and authority to advance the interests of all Aboriginal peoples as reflected in subsections 35(2) and 91(24).

In light of the foregoing conclusion that the Metis are included within section 91(24), it becomes necessary to examine the ramifications if such a conclusion were also to be adopted by the Canadian courts or the federal government.

The first and obvious point is that this legal conclusion clearly affirms the constitutional jurisdiction of Parliament to enact legislation in relation to the Metis alone or in conjunction with part or all of the other two primary groupings of Aboriginal peoples. Metis-specific legislation could no more be challenged as exceeding Parliament's sovereign authority than could the *Indian Act* today. In other words, Parliament has exclusive jurisdiction, vis-à-vis provincial legislatures, to enact laws that would in effect apply to "Metis, and Lands reserved for the Metis". The constitutional amendment proposed in the Charlottetown Accord would have brought about this result in another way by confirming that section 91(24) applied to all Aboriginal peoples. Thus, section 91(24) would have been read in the comprehensive sense of stating "Aboriginal peoples, and Lands reserved for the Aboriginal peoples".

While the precise outer parameters of section 91(24) are beyond the scope of this paper and have yet to be determined definitively by the Canadian courts in any event,²²¹ it would mean without question that Parliament could legislate regarding the Metis. Furthermore, it would confirm the authority of the representatives of the Crown in right of Canada to treat with the Metis as collectivities and to conclude land claims settlements with them, rather than having to rely upon the uncertain jurisdiction to do so that may be contained within the peace, order and good government clause or the general federal executive authority to negotiate treaties. It would also naturally encompass the

negotiation of other sectoral agreements, such as fisheries agreements within the scope of the federal *Fisheries Act*.²²²

These comments on the scope of federal authority under section 91(24) should not be misconstrued into suggestions that Parliament's authority is unlimited in this sphere, or that provincial legislatures have no jurisdiction whatsoever. Suffice it to say for current purposes that any federal legislation would still be required to conform to the balance of the "Constitution of Canada" within the meaning of section 52 of the *Constitution Act, 1982*. This includes, of course, the *Canadian Charter of Rights and Freedoms* and subsection 35(1), both of which are applicable here. Their presence serves to restrain any Diceyan notion of unadulterated parliamentary supremacy. Furthermore, Parliament can legislate under section 91(24) only when it is actually doing so; that is, it cannot merely assert this head of authority as justifying legislation that has nothing to do with the substance of this head of power.

Likewise, the provinces do possess a significant level of legislative jurisdiction concerning the Metis (as they do at present regarding other section 91(24) Indians along with *Indian Act* Indians). Such authority, however, is not only subject to the Charter and section 35, but also to parliamentary override under the paramountcy doctrine. The extent of potential and current provincial legislation will be examined briefly in the next few pages, but first it is appropriate to consider further the federal domain.

A further impact of adopting the legal view asserted here would be felt immediately by the Department of Indian Affairs and Northern Development (DIAND). It would lose one of its primary excuses for refraining from dealing with the Metis, namely, that they are outside its constitutionally inspired mandate. This might not in and of itself mean that DIAND would suddenly engage in extensive dealings with the Metis. At present DIAND declines to deal directly with off-reserve Indians and

the Inuit to any significant degree, except for those residing within the Yukon and the N.W.T. (and in these cases it is relying upon its general authority in the territories, which it extends to some degree to the Metis residing within this region in any event, rather than its mandate for Indian affairs). Nevertheless, it would naturally be harder for DIAND to resist all overtures from the Metis to initiate a relationship. This would be all the more so given that the NCC has had some minimal success over the past few years in receiving funding and embarking upon negotiations on a restricted range of matters, although DIAND has rationalized this based solely upon the presence of status Indians within NCC's constituency. Neither MNC nor NCC has been able to forge a relationship with DIAND on Metis issues, as DIAND views these matters as the responsibility of the provinces and the federal minister appointed by the prime minister as the Interlocutor for Metis and Non-Status Indians and his officials in the Privy Council Office (PCO). There also might be a suggestion from some quarters that subsection 4(1) of the *Indian Act* should be amended to add the Metis to the reference excluding Inuit from the legislative category of Indians under that Act.

Another less important note regarding the federal machinery of government concerns the federal minister assigned the added responsibility in cabinet as the Federal Interlocutor for Metis and Non-Status Indians. This position, if it can truly be designated as such, was created in 1985 by Prime Minister Mulroney in response to complaints from the MNC and the NCC that their interests were being ignored by DIAND and its minister. There simply was no member of cabinet at the time who had an express mandate in reference to them and their constituents. This was in contrast to the position of the AFN and the ITC vis-à-vis the minister of Indian affairs and despite the existence of constitutional negotiations involving all four organizations and the 11 senior governments plus both territories. Initially, the

mandate of interlocutor was assigned to John Crosbie, who was then the minister of justice and played a central role in the constitutional talks of that time. Because of perceptions that a conflict of interest existed between the role of justice minister and attorney general²²³ on the one hand and addressing the concerns of the Metis and non-status Indians on the other, the role was reassigned in May 1992 to Jake Epp, then the minister of energy, mines and resources. This move was intended to eliminate that apparent conflict of interest as well as to put the mandate into the hands of a senior cabinet member who was anxious to devote a significant degree of energy to the assignment, with continuing administrative and logistical support from the Federal-Provincial Relations Office (FPRO) before it was abolished earlier this year and the assignment given generally to the PCO. Mr. Epp was replaced upon his retirement from cabinet by Jim Edwards. Although it would be readily possible to conceive of this role remaining with a separate minister and the PCO, one can also envision efficiency imperatives favouring the collapsing of it into a renamed DIAND with a new Minister of Aboriginal Affairs.

A far more important issue, at least from a legal perspective, is the question of whether inclusion within section 91(24) means that Parliament has not only the capacity, but also an obligation to legislate so as to advance the interests of the people referred to therein. This is a question to which federal government lawyers would likely provide a clear and firm 'no', relying upon traditional views of Dicey and others on the doctrine of parliamentary sovereignty and the historical reluctance of the courts to order the Crown or Parliament to do or refrain from doing anything. Since an obligation to legislate, derived from the fiduciary relationship or otherwise, is as applicable to the Inuit and off-reserve registered Indians as it is to the Metis and unrecognized Indians, this is an issue that to some degree transcends the scope of this

paper. The presence of such an obligation has also been mooted by First Nations when they have encountered bureaucratic or political resistance from the federal government to their proposals to advance their interests through an act of Parliament (e.g., national legislation in relation to child welfare and education).

This issue is also a highly complex matter that warrants detailed attention in its own right.²²⁴ Nevertheless, it can at least be suggested that this question can no longer be discarded as easily as it once was. A reasonably strong argument can be made that the law – and along with it our concept of the division of powers in the *Constitution Act, 1867* through sections 91 and 92 and the discretionary nature of law making by those two sovereign orders of government in Canada – has already changed fundamentally, at least in reference to the relationship between Aboriginal peoples and the Crown. This change in law and in our perception of the division of powers is derived from two basic sources.²²⁵ The first is the effect of constitutional entrenchment of Aboriginal and treaty rights in subsection 35(1) in 1982. The second is the judicial articulation in 1984 in *Guerin v. The Queen*²²⁶ of the Crown fiduciary obligation.

This obligation has subsequently been clarified in the constitutional context and, arguably, expanded by the Supreme Court of Canada in its decision in *Sparrow v. The Queen*²²⁷ in 1990. In the unanimous judgement delivered jointly by Chief Justice Dickson and Mr. Justice La Forest, the Court made clear that not only does the fiduciary obligation exist to the benefit of "Aboriginal peoples" (as opposed solely to Indians registered under the *Indian Act*), but that this obligation forms part of the rights that have been "recognized and affirmed" within subsection 35(1). The Court set out a test for dealing with the infringement of Aboriginal and treaty rights that contains components of particular relevance to this fiduciary obligation, including

the emphasis upon honourable dealings, adequate consultation, avoidance of conflicts of interest, and the giving of appropriate priority to Aboriginal interests before considering those of others. Giving a broad but not unrealistic interpretation to this judgement would lead to the view that there is a positive duty upon the Crown in its fiduciary capacity to exercise the authority it possesses to initiate legislation designed to advance the interests of the beneficiaries of this relationship. Analogies with the private law of trusts, which the Supreme Court of Canada has condoned, albeit with admonitions of care given the *sui generis* nature of the Crown-Aboriginal relationship, lead to the conclusion that there is a positive duty to promote the well-being of the beneficiaries, even at the expense of the fiduciary's own best interests. Not only must conflicts of interest be avoided while putting the beneficiaries' interests ahead of the fiduciary's own, but private trustees have been held obligated to use their own finances when the trust property is insufficient to meet the essential needs of the beneficiaries. This approach could be extended to the rather different context of Crown-Aboriginal relations to suggest that the federal government is breaching its fiduciary obligations if it refuses to initiate legislation needed to acknowledge the existence of certain Aboriginal peoples or to meet basic economic or social needs.

It must be admitted, however, that it is one thing for the courts to suggest that the executive branch is in breach of a legally recognized duty and quite another for the courts to declare that the absence of legislation constitutes a breach, let alone grant an order declaring that the breach should be rectified by initiating a statute. The latter would represent a significant departure from precedent to say the least. A further vital distinction is between the federal government and Parliament. It is unlikely indeed that Canadian courts would order Parliament to use its sovereign law-making authority to pass a particular

act. It is somewhat more conceivable, however, that the judiciary might declare that the executive, as the tangible representative of the Crown in right of Canada, should fulfil its obligations and to suggest that the way to meet its obligation in a particular case would be to initiate legislation. Judicial scrutiny of such an argument might become more sympathetic if emphasis is placed upon Charter requirements concerning equality of treatment and equal access in light of the existence of federal laws that do advance the interests of only a portion of the Aboriginal population. Whether the government would introduce a statute to meet this purpose, and whether the House of Commons and the Senate would pass such legislation, would almost certainly be left within the full authority of Parliament itself.

The more directly relevant issue for this essay is the impact upon provincial legislative authority of once and for all including the Metis within section 91(24). In practical terms, there are two aspects to this issue. The first is the general impact of federal section 91(24) jurisdiction as such upon provincial legislative jurisdiction under the Constitution. This is an issue that has been present since 1867 and that continues to be relevant today in reference to all section 91(24) Indians. In other words, the impact of a federal head of power regarding persons who are also provincial residents is not unique to the Metis. The second aspect of the issue of including Metis within section 91(24) relates to the Alberta legislation concerning the Metis settlements (or "colonies", as they were once so ironically termed). This legislation has existed in various forms since 1938 and resulted from the recommendations of the Ewing Commission, established in 1934 to examine the social and economic problems of the Metis in the province. In short, the second aspect is the question of provincial Metis-specific legislation.

The first aspect, the impact of section 91(24) in general on provincial legislative authority, gives rise to a constitutional quagmire

where few judicially provided guidelines exist to assist in pulling oneself out of the muck. The question has rarely been examined judicially in its pure form. Section 88 of the *Indian Act* has been decisive in many cases, and its mere existence has been highly influential in others – even where unwarranted. When the cases that have turned on section 88 are removed, little in the way of judicial guidance remains concerning the extent to which section 91(24) precludes provincial legislation that is not in direct conflict with federal Indian legislation. In other words, there is little to indicate the extent to which the classic paramountcy doctrine would justify federal inroads into what has been viewed traditionally as provincial jurisdiction. Perhaps the best commentary, although far from complete or clear, emanates from the *Natural Parents* case,²²⁸ in which the Supreme Court of Canada declared that no provincial legislation could impair the very status of Indians registered under the *Indian Act*. The Court also went further than necessary by indicating that a provision inserted by way of amendment from the legislature of British Columbia, intended to confirm that adoption under the provincial statute could not determine or affect Indian status, was itself invalid.

It is our belief that the better view of *Natural Parents* and the overall state of the law is that provincial legislation cannot impair the rights or interests of Aboriginal peoples expressly. General legislation may be applicable when it is not explicitly or implicitly intended to affect Aboriginal peoples negatively and does not contradict other recognized rights, including those in subsection 35(1). The key to the application of provincial legislation is the issue of impairment of rights or status that flow from Aboriginal ancestry or membership in an Aboriginal collectivity or nation. We would submit that provincial enactments cannot bring about such impairment either directly or indirectly.²²⁹

On the other hand, legislation of a positive nature may be perfectly valid when it is not related solely or even primarily to matters that would normally come within section 91(24). A wealth of provincial statutes enacted over the past two decades make some reference to "Indians", "Natives", or "Aboriginal peoples". One ready example is child and family services legislation in a number of provinces. These references are usually intended to acknowledge the different interests of Aboriginal peoples and to give some supportive attention to their needs for involvement in certain processes (e.g., school board representation or court proceedings), to demonstrate respect for their values (e.g., the importance of cultural continuity or the valuable role of the extended family in child welfare matters), or to describe the limits of the application of otherwise constitutionally valid laws (e.g., the *Charter of the French Language* contains within it a declaration that it does not apply generally on reserves along with a special regime for the Cree and Inuit communities as a result of negotiations and the James Bay and Northern Quebec Agreement). It is hard to imagine that the courts would strike down such an array of provisions across the country that have been so well received by, and often developed in conjunction with, the Aboriginal peoples concerned.

It should also be noted that there has been a long history of provinces passing laws that are complementary to federal ones designed to implement federal-provincial agreements relating to Aboriginal peoples in some way.²³⁰ More recently this has been expanded from dealing with Indian reserve lands to ratifying land claims settlements. There is presumably little doubt about the constitutionality of the provincial legislative component of such complementary arrangements.

With respect to the Metis-specific Alberta legislation vis-à-vis section 91(24), the following question arises. If the basic test is, does the provincial statute discriminate negatively against or impair the

unique legal rights and position of Aboriginal peoples, then what is the outcome when it is applied to the Alberta legislative package concerning the Metis settlements?²³¹ We would suggest that a proper response to this question would contain two components. First, that the test is inapplicable when it comes to the Alberta Metis settlements legislation; and second, that the legislation would likely fail the test if it did apply.

The reason for concluding that the test does not apply is that the compendium of statutes that now forms the made-in-Alberta arrangement is unique in Canada. Not only is it the sole example of Aboriginal-specific legislation enacted by a province, it is also the only statute in Canada regarding the Metis. While its breadth is now analogous to the *Indian Act*, both its initial rationale in 1938 and the reason for its complete overhaul in 1990 stem from very different sources. Its current format was enacted pursuant to an agreement to resolve the outstanding litigation between the Metis settlements and the province over entitlement to subsurface royalty rights while providing freehold title to the individual settlements and an enhanced level of local, delegated powers of government. The Alberta Metis legislation represents the single example of a provincial legislature enacting a law that is directed exclusively to Aboriginal peoples generally, or a segment thereof, that is not part of a complementary effort pursued in conjunction with the Parliament of Canada or not authorized directly by a land claim settlement.²³²

It is hard to imagine a clearer case of an explicit invasion of what is declared by the opening language of section 91 of the *Constitution Act, 1867* to be an exclusive head of federal power. It is impossible to argue that this is a matter that is merely necessarily incidental to another head of provincial law-making authority, even if one could characterize the nature of this legislative package, or its predecessor in the form of the *Metis Betterment Act*, which can trace its

roots back to 1938, as properly falling within "Property and Civil Rights in the Province" under section 92(13). Likewise, any assertion that the package of agreements between the Alberta Federated Metis Settlements Association (AFMSA) and the province, as well as the subsequent implementing legislation, constitute a treaty would still leave the same constitutional challenges.

The only viable way to characterize this collection of legislation is that their pith and substance relate directly to the "Metis, and Lands reserved for the Metis". So long as the Metis are within the purview of Parliament and the federal Crown under section 91(24), it appears impossible to visualize this particular arrangement as being within the jurisdiction of the province of Alberta. This is not meant to imply that a province is restricted from setting aside lands for the exclusive use of Aboriginal people, or from transferring full ownership to them. It may even be that a provincial government could impose fetters upon the province's own legal rights that would normally not exist. The critical issue here is that the Alberta legislature has not done so in any private law sense. Instead, it has invoked its constitutional authority to legislate to alter the otherwise prevailing state of the law and to go beyond the common law so as to create a special governmental regime under local Metis control to regulate the administration of these lands.

Furthermore, the province has done far more than create a special landholding regime for these sizeable blocks of land. It has also attempted to define who are the Metis for the purposes of being able to benefit from or reside upon these lands. It is hard to conceive of anything touching 'Indianness' more directly than defining who is included and who is excluded from this constitutionally recognized group. The legislation further regulates the lives of the Metis on the settlements by establishing local governments, setting out their minimal law-making jurisdiction, authorizing extensive control over daily affairs

by the appropriate minister of the day, delimiting the harvesting rights of the Metis, and defining the nature of the relationship between the Crown in right of Alberta and these Metis settlements, among other matters.

It seems clear, therefore, that the Alberta Metis legislation is readily subject to constitutional challenge. In large part for this reason, AFMSA and the provincial government have been attempting for several years to obtain active federal involvement in protecting this package of legislation and the collateral agreements. The Legislature passed a constitutional resolution in 1990 designed to amend the *Alberta Act*²³³ so as to entrench the title of the Metis in the settlement lands and confirm that the total statutory package is a valid exercise of provincial legislative power.²³⁴ The federal government has refused to table the resolution in Parliament for its consideration on the basis that this can be proceeded with only by way of the amending formula under section 38 of the *Constitution Act, 1982* as a general amendment rather than through section 43 as a matter affecting only Alberta. The federal Department of Justice view relies upon giving a narrow interpretation to the wording in the latter amending formula provision, so as to restrict it solely to the items identified therein (i.e., "any alteration to boundaries between provinces" and "the use of the English or the French language"). While this view is open to challenge by the alternative view held by Alberta that section 43 is more than sufficient for this purpose, especially given the use of section 43 to achieve an amendment on denominational schools for Newfoundland, it is worth noting that the federal cabinet has resisted requesting six other provinces containing over 50 per cent of the population when added to Albertans to pass the same resolution so as to remove any doubt. The failed Charlottetown Accord would have resolved this latter issue by including the *Alberta*

Act amendments as part of the overall collection of amendments to be passed by all 10 provincial legislatures and Parliament.

The Charlottetown Accord also responded directly to the issue of clarifying the position of Metis as falling within the scope of section 91(24). As previously mentioned, it was proposed to add a 'for greater certainty' amendment as section 91A to make it explicit that 91(24) includes all Aboriginal peoples. As a result of this provision in particular, Alberta and AFMSA both felt that it was absolutely essential to obtain a further amendment clarifying that the government and the Alberta legislature would have a level of constitutionally recognized authority in reference to the Metis. They argued that this was necessary to reflect the unique history in that province of an active relationship between the two for well over 50 years. More immediately, they wished to ensure that the made-in-Alberta package of 1990 would endure for the foreseeable future. The modality for which they opted was to allow the province of Alberta alone the equivalent authority to Parliament, subject to resolving any conflicting legislation through the normal doctrine of federal paramountcy. The mere fact that it was believed vital to include such a provision demonstrates the collective view among lawyers for most if not all 17 parties to the Charlottetown negotiations that the Alberta legislation either was in serious jeopardy or could not be sustained in the face of federal authority concerning the Metis under 91(24).

CONCLUSIONS

In this research paper we have attempted to review the existing literature and jurisprudence as well as to concentrate upon some of the historical and political motivations that underlay the remarkable and tragic

relationship between the Metis or ‘mixed-blood’ peoples and the other two sovereign orders of government in what is now known as Canada.

The Metis have spent the better part of the last century largely overlooked by the society in which they lived. After being manipulated during the scrip process, resulting in neither a land base nor an economic base on which to build a new future to replace the trading and buffalo hunting lifestyle that disappeared in almost a blink of an eye, the Metis found themselves pushed to the margins of Canadian society. They came to be referred to in many places in the prairies as the road allowance people, for the only land on which they often could live was alongside rural highways on the land reserved by the Crown as road allowances in case of future expansion. They became, in effect, squatters within their own territory.

Only the Alberta government, during the depths of the Great Depression, responded to their social and economic plight by appointing a royal commission to investigate the extent of the problem and propose concrete solutions. Influenced by excellent Metis leaders,²³⁵ the Commission recommended and the government relatively quickly implemented the creation of Metis ‘colonies’ similar to reserves and the *Indian Act* regime through the *Metis Population Betterment Act* of 1938.²³⁶

All other provinces at that time turned a blind eye to the deprivation experienced by Metis within their borders, while at the same time completely ignoring any entitlement that the Metis may have had to Aboriginal or treaty rights within that territory. The federal government pursued a similar approach, pleading that, since Metis were outside section 91(24), it had no jurisdiction to intervene to assist them. The federal government seemed conveniently to forget its role in the distribution of scrip. Provinces other than Alberta took the reverse

position and pointed their collective political fingers toward Ottawa for action.

This game of passing the buck has continued up to the present and is as alive and well as ever following the rejection of the Charlottetown Accord. It can only be hoped that the federal government will adhere to the spirit of this Accord and adopt the legal conclusion that we have reached, namely, that the Metis are already encompassed within section 91(24) such that the federal government, therefore, has the jurisdiction to intervene legislatively or under its administrative authority if it so desires. As the latest census data from Statistics Canada indicate, the Metis continue to remain both disadvantaged and dispossessed in almost all parts of this wealthy land such that concrete and substantial action is desperately needed.

We have also concluded that the Metis are included within the fiduciary relationship owed by the Crown to Aboriginal peoples. The Supreme Court of Canada has to date articulated only certain aspects of this relationship, and only in the context of the Crown in right of Canada. It is also to be noted that the Court has not indicated that the fiduciary obligation is limited solely to the federal sphere.²³⁷ The Chief Justice of British Columbia has, in fact, declared that this relationship does extend to the provincial Crown as well.²³⁸

Concluding that the Metis can benefit from this fiduciary relationship does not provide any clarity as to the precise ramifications and applications of any particular duties. Due to the lack of judicial guidance to date, it is simply not yet possible to conclude whether the general Crown obligation has crystallized into any specific duties. This is especially relevant regarding the Metis, since there is no property currently held by the Crown on their behalf, as there is in reference to First Nations in the form of reserve lands and trust accounts. The Alberta government was in this situation prior to the Accord of 1990

but is no longer, as freehold title to the Metis settlement lands has now been conveyed directly to the Metis communities.

We have further concluded that the provinces cannot enact restrictive or negative legislation concerning the Metis specifically. General provincial legislation would, however, still apply subject to any constitutional limitations, including subsection 35(1) and any inherent right of self-government if protected by that provision. One aspect of this conclusion is that the Alberta legislation regarding the Metis settlements is likely unconstitutional. Although arguments could be made based upon viewing the Accord and the legislation as a treaty, or that the provincial legislation should be sustained for being a positive initiative rather than a negative intrusion into federal jurisdiction under section 91(24), these assertions face an uncertain future at best. As a result, we would urge that immediate action be taken by the federal government to enact enabling legislation to sustain the Alberta statutes or to pursue a constitutional amendment to validate this provincial legislation, as was proposed in the Charlottetown Accord for inclusion in the *Constitution Act, 1867* in section 95.

We have also raised the issue, without reaching a firm and final conclusion, that there may be a positive duty on the Crown as a result of its fiduciary obligation to advance the interests of the Metis through appropriate means, including the passage of special legislation if so desired by any significant groups of Metis people. We anticipate that this point will be explored in the near future in litigation such that a clear articulation of the law may well be developed. Our preliminary opinion on this point is that there is a positive duty on the Crown to act so as to ameliorate the severe disadvantages that confront the Metis people.

We have not examined for the purposes of this paper the question of whether the Metis possess Aboriginal title in general or

other Aboriginal and treaty rights. The information examined for the particular purpose of determining federal and provincial jurisdiction and responsibility, however, does lead us to believe that the Metis can make a very convincing claim where the evidence meets the normal test under the doctrine of Aboriginal title and there has been no valid surrender or extinguishment of their interests in land. The latest cases dealing with Metis and non-status Indians, such as the *Ferguson* and *Fowler* cases, demonstrate that the courts are following a very different and more sympathetic path concerning Aboriginal and treaty rights when advocated by these people today than was the case in the past.

Let us conclude with a few comments regarding directions for further research. We firmly believe that it is unnecessary to devote further energy to the issue of constitutional jurisdiction and responsibility. This matter has now been thoroughly examined and warrants no additional research. This question is realistically in the hands of the federal cabinet to decide whether it will honour its authority. Alternatively, there is little reason for further delay in pursuing litigation to obtain a clear declaration from the courts confirming that the Metis are in fact Indians within the meaning of section 91(24). The MNC has regularly raised the issue of seeking a constitutional reference on this question. It is to be hoped that the federal government will take the initiative and declare that it possesses jurisdiction under section 91(24) to address Metis issues. Failing this, it is at the very least necessary for such a reference to be launched by the federal government to the Supreme Court of Canada, or by a province to its court of appeal, to settle the matter once and for all so as to remove this obstacle to progress. It is clear that any prospect for significant achievements in tripartite self-government negotiations or to finalize the Metis Nation Accord are dependent upon resolving this

jurisdictional issue first, as well as the financial implications that will flow from the substance of its resolution.

The more important issue that does deserve additional attention and research by the Royal Commission on Aboriginal Peoples is the matter of establishing definitional parameters to the term 'Metis' within both subsections 91(24) and 35(2). One of the practical matters that has discouraged federal acceptance of authority has been a lack of understanding as to what the outer limits to this mandate and the potential cost implications might be. The rather ridiculous suggestions by unnamed officials in DIAND in the spring of 1992 during the constitutional negotiations - that the inclusion of the Metis within section 91(24) would result in an additional federal expenditure of \$5 billion per year²³⁹ - has had certain influence because of the absence of any serious analysis whatsoever on this subject. While merely doubling the current budget of DIAND is a ludicrous approach, it is important to come to grips with the fear that underlies these allegations. Attempting to develop suitable parameters for program initiatives need not necessarily and likely should not be used to attempt to develop rigid boundaries for all purposes. There is little attraction to creating new categories of status and non-status Metis after the experience with the *Indian Act*. At the same time, significant federal initiatives with potentially considerable financial implications are thoroughly unlikely without a sufficient data base to permit reasonably realistic projections to be generated, so that the government can assess the viability of such programs before launching them. In addition, one would anticipate that the federal government would seek, if not insist upon, provincial partnership and that these governments would also demand solid data and convincing cost projections.

Further research would also be useful on the capacity of the Canadian courts under prevailing jurisprudence to go beyond merely

granting a declaration that the Metis are within section 91(24) if litigation does become necessary. Related issues worthy of consideration include judicial relief in the form of an order to the government to take specific action of a positive nature or to refrain from pursuing certain actions. Our courts have not demonstrated any inclination along this line, as it entails the courts imposing their views on the sovereign, which has always possessed full immunity from what are its own courts except when expressly waived through legislation. Nevertheless, the bounds of what courts can do have been stretched quite dramatically in the United States over the last three decades, particularly through the development of the structural injunction, while Canadian courts have expressed some willingness at least to review a broader range of governmental actions than in the past.²⁴⁰

On the basic subject covered in this paper, however, there is no need for further research. The time is long since past for the federal government to declare that it will recognize that its authority and responsibility extend to the Metis. Such a bold move in and of itself will not lead to a single job, house or better standard of living for Metis people. It will, however, remove what has become a major obstacle to progress—whether through the tripartite self-government negotiations process involving the Metis and off-reserve Indians that has existed since 1985, but with few concrete signs of achievements, or in developing new programs to advance the interests of Metis people and their communities. One can only hope that in future the Metis will never again be known primarily as the forgotten, the dispossessed or the road allowance people.

RECOMMENDATIONS

As is apparent from the preceding section, we have reached a few specific recommendations for the further consideration of Commissioners as well as several subjects deserving further research. The particular recommendations we have offered are as follows:

1. That the Royal Commission on Aboriginal Peoples formally conclude that the Metis are included within the expression "Indians" within section 91(24) such that the federal government has the mandate and the capacity to enter into treaties and other relations with the Metis Nation and other Metis groups in Canada.
2. That Commissioners recommend to the government of Canada that it renew efforts at constitutional reform to build upon and improve the Aboriginal provisions contained in the Charlottetown Accord. This would mean confirming clearly and without hesitation that section 91(24) applies to all Aboriginal peoples. More importantly, it would also involve recognizing and affirming the inherent right of self-government for the Indian, Inuit and Metis peoples.
3. That the Royal Commission conclude that the Metis are beneficiaries of the fiduciary relationship with the Crown. Further, it should recommend to the federal government that it respect its fiduciary obligation such that it immediately enter into comprehensive negotiations with representatives of the Metis people.
4. That Commissioners recommend to the federal government that it take immediate action to implement the amendments to the *Alberta Act* sought by the Alberta government and the Alberta Federated Metis Settlements Association. Not only will this

provide tangible constitutional protection to the land rights of the Metis settlements, but it will also address concerns about the invalidity of the provincial legislation.

NOTES

- * The term 'section' will be used in relation to 91(24) rather than the more technically correct subsection, or Class 24 of head 91 as it was originally called, throughout this paper for ease of reading and to reflect the more common popular expression.
- 1. The spelling of the word 'Metis' is somewhat problematic because of the political connotations involved. In this paper the unaccented but capitalized version will be used because it is the one that seems to have the greatest degree of general acceptance among the persons most affected in Canada. The term is generally used without an accent by both the Metis National Council and the Native Council of Canada. It should not be taken, therefore, as a statement by the authors of adherence to any particular political interpretation. Likewise, the term 'mixed blood' will often be used as a more general and comprehensive label, although with some discomfort, as the concept of mixed and pure blood, along with the term half-breed, has often been used in a derogatory fashion in Canadian history.
- 2. The Labrador Metis Association also uses the term Metis to encompass persons whose ancestry may be part Inuit who have affiliated themselves with other Metis of Indian and non-Indian ancestry.
- 3. R.S.C. 1985, c. I-5. The Act for many years expressly disentitled anyone who had taken land scrip or their descendants from being registered, while not otherwise excluding children of mixed marriages so long as the father was a registered Indian and the parents were married. This disentitlement was removed in the Bill C-31 amendments of 1985, along with much of the prior discrimination on the basis of sex. As a result, many Metis people are not entitled to obtain status and an unknown number are now status Indians.
- 4. Antoine Lussier, "The Question of Identity and the Constitution: The Metis of Canada in 1984", *Aspects of Canadian Metis History* (Ottawa: Indian and Northern Affairs Canada, 1985), 1 at 1.

5. *Ibid.*, at 1-2. The definitions are:
 - (a) A person of mixed blood, Indian and European;
 - (b) One who considers himself Métis;
 - (c) An enfranchised Indian;
 - (d) One who received land scrip during the 1870s and '80s;
 - (e) One who is identified with a group that identifies itself as Métis;
 - (f) A Native person who is not a registered Indian;
 - (g) In some Manitoba Métis Federation locals, a non-Native can belong to the Manitoba Metis Federation provided he/she is married to a Métis. For purposes of the administrative records of the organization, that person is counted as Métis.
6. L'Union Nationale Métisse de St. Joseph du Manitoba, *ibid.*, at 2-3.
7. *Ibid.* Professor Lussier gave expert testimony in a recent Metis Aboriginal hunting rights case in Manitoba, *R. v. McPherson* [1992] 4 C.N.L.R. 144, noting that in the 1982 census 93,000 people in western Canada self-identified as Metis. He estimated the real number was around 300,000 people. He is reported (at 150) to have testified that "We cannot come to an agreement as to who is or is not a Metis."
8. See Native Council of Canada, "A Statement of Claim Based on Aboriginal Title of Metis and Non-Status Indians" (Ottawa: NCC, 1979), at 1-8. Reference is made to Metis claims running from Quebec to British Columbia and including both territories.
9. Bryan Schwartz discusses the breakaway of the prairies Metis organizations in *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: The Institute for Research on Public Policy, 1986), at 91-93. He adverts to the definition question at p. 92, noting that "many Métis in western Canada adopt a nationalistic rather than a racial definition..." that focuses on the historical Metis Nation that arose in western Canada in the nineteenth century. Antoine Lussier also discusses this event in "The Metis and the Non-Status Indians, 1967-1984" and "The Metis and the Indians, 1960-1984", in *Aspects of Canadian Metis History*, *supra*, note 4 at 54. He notes that the leaders of the Metis National Council also belonged to their former provincial parent bodies which at that time still represented non-status Indians. Thus the national body, the Native Council of Canada, was split on an issue that had not yet been resolved by the affiliated provincial bodies.

10. Donald Purich, *The Metis* (Toronto: James Lorimer and Co., 1988), at 13.
11. Metis Nation Accord, October 6, 1992, section 1.
12. "Draft Constitution of the Government and People of the Metis Nation", Part I, section 6, Constitutional Session Briefing Book, February 1, 1993, discussed during the MNC General Assembly, February 5-7, 1993, Vancouver.
13. Lussier, *supra*, note 4, at 4.
14. Alexander Morris, *The Treaties of Canada With the Indians of Manitoba and the Northwest Territories* (Toronto: Belsford Clarke and Co. 1880; Coles reprint, 1979). The author refers to the earlier Robinson-Superior and Robinson-Huron treaties in this regard at 16-21.
15. *Indian Treaties and Surrenders from 1680 to 1890 in Two Volumes* (Ottawa: Queen's Printer, 1891, reprinted 1905), vol. 1 at 308.
16. David McNab, "Métis and The Treaty-Making Process in Ontario", Unpublished Paper for the Metis Symposium, University of Saskatchewan, May 5, 1984. A variation of this paper was subsequently published as "Metis Participation in the Treaty-Making Process in Ontario: A Reconnaissance", *Native Studies Review* 1/2 (1985).
17. *Ibid.* McNab describes the negotiations and surrounding circumstances regarding Treaty 3 in "Hearty Co-operation and Efficient Aid, the Metis and Treaty #3", *Can. J. Native Studies* 3 (1983), 131.
18. Morris, *supra*, note 14, at 294-95.
19. This is described in Olive Patricia Dickason, *Canada's First Peoples* (Toronto: McLelland and Stewart, 1992), at 316-19.
20. *Ibid.*, at 317-18.
21. Richard Daniel, *A History of Native Claims Processes in Canada 1867-1979* (Ottawa: Indian and Northern Affairs Canada, 1980), at 25.

22. The history of the Ewing Commission is set out in Dickason, *supra*, note 19 at 359-365, and in Fred Martin, "Federal and Provincial Responsibility in the Metis Settlements of Alberta", in *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles*, ed. D. Hawkes (Ottawa: Carleton University Press, 1989), at 258-263.
23. Martin, *ibid.*, at 260.
24. S.A. 1938, c.6, s. 2(a).
25. S.A. 1940, c.6.
26. T. Pocklington, "Our Land-Our Culture-Our Future: The Government and Politics of Alberta Metis Settlements", unpublished manuscript, University of Alberta, 1988, at 11, reported in Martin, *supra*, note 18, at 260-61. A version of this paper has now been published as *The Government and Politics of the Alberta Metis Settlements* (Regina: Canadian Plains Research Centre, University of Regina, 1991).
27. *Le Petit Robert 1, Dictionnaire alphabétique et analogique de la Langue Française* (Paris: Le Robert, 1983), at 1192.
28. *Harrap's Shorter Dictionnaire Anglais-Français French-English Dictionary* (London: Harrap Ltd., 1982), at 471.
29. A short survey of descriptions of the people referred to by the terms 'Metis' and 'half-breed' is provided by Lussier, *supra*, note 4, at 6-12. These descriptions, emanating primarily from the colonizers, are not always flattering.
30. See Lussier, *ibid.* See also Alan D. McMillan, *Native Peoples and Cultures of Canada* (Toronto: Douglas and McIntyre, 1988), at 273, and J.R. Miller, *Skyscrapers Hide the Heavens* (Toronto: University of Toronto Press, 1989), at 126. All three authors note the distinction between the Metis and the country-born or half-breed, but go on to remark that the former now encompasses the latter in modern usage. This is exemplified by Purich, *supra*, note 10, and Catherine Bell, "Who Are the Metis People in Section 35(2)?" *Alta. L. Rev.* 29 (1991), 351. The latter two authors both discuss the Metis in a relatively comprehensive way without adverting to the original distinction between French-speaking 'Métis' and English-speaking 'half-breeds'.

31. Purich, *supra*, note 10, states in this regard (at 15), "The growth of a mixed-blood population is by no means unique to Canada. In many South and Central American countries the mixed-blood people form a significant part of the population. In Ecuador, 45 per cent of the country's 8 million people and its largest racial group is Mestizo, the Spanish-American term for mixed-blood people. What makes the mixed blood population of Canada unique is that they developed a distinct cultural and political identity. They did not seek to be Indians nor, as in many South American countries, did they aspire to become white." Separate mixed-blood populations developed in many regions where white exploration and colonization occurred in Africa and Asia as well. The term 'Eurasian', for instance, attests to this phenomenon regarding intermarriage between Europeans and Asians. In this regard, see also Bradford W. Morse and Robert K. Groves, "Canada's Forgotten Peoples: The Aboriginal Rights of Metis and Non-Status Indians", *Law & Anthropology* 2 (1987), 139.
32. Many historically significant tribal chiefs were not full-blooded ethnological Indians, e.g., William McIntosh of the Creeks, John Ross of the Cherokees, Osceola of the Seminoles, Quannah Parker of the Comanches, etc. Muriel H. Wright, in *A Guide to the Indian Tribes of Oklahoma* (Norman: University of Oklahoma Press, 1986), discusses (at 61-62) the fact that many influential members of the Cherokee Nation were of mixed blood:
- The remarkable advancement of the Cherokee as a people came about largely through the influence of the mixed-blood families of Irish, German, English, Welsh or Scottish descent whose ancestors settled and married in the nation during the eighteenth century. Among them were such names as Adair, Vann, Chisholm, Ward, Hicks, Reese, Wickett, Fields, Ross, Lowry, and Rogers, all well-known tribal families whose descendants were prominent in Cherokee history. Many of them were planters and traders, owners of substantial residences, Negro slaves, and large tracts of cattle by 1800.
- In the United States the issue of 'half-bloods' as a category apart from tribal units has not arisen as it has in Canada. This is because tribes are separate political entities, regarded at law as "domestic dependent nations", with a right to control their own membership. Tribal codes do not necessarily reflect a uniform standard, but there is generally always a blood quantum or kinship requirement. The feature that counts is tribal acceptance of someone as a member, whether or not that person is formally

registered on the tribal roll and whether or not that person is a full-blood ethnological Indian. A person who would probably be classified as Metis or non-status Indian in Canada will often be accepted as a tribal member in the United States.

For most federal services through the Bureau of Indian Affairs an 'Indian' is someone of at least one-quarter Indian blood, a member of a federally recognized tribe and living on or near a reservation. Other federal legislation may simply defer to tribal practice, follow BIA practice, impose a higher or lower blood quantum requirement, or, as below, even impose a charter group requirement. The 1934 *Indian Reorganization Act* [25 U.S.C., s. 479] defines Indian in a manner that calls upon tribal practice, membership in a charter group of Indians as at a certain date, and simple blood quantum: "19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For purposes of this Act, Eskimos and other Aboriginal peoples of Alaska shall be considered "Indians"." Programs offered to Indians by some states generally use a one-quarter Indian blood rule eligibility criterion, but this is a matter within the control of the state concerned.

33. Alvin Kienetz, "The Rise and Decline of Hybrid (Métis) Societies on the Frontier of Western Canada and Southern Africa", *Can. J. Native Studies* 3 (1983), 3.
34. S.C. 1870, c. 3. For an excellent and exhaustive review of this legislation, its background and the disastrous way in which it was implemented, replete with continual breaches, see Paul L.A.H. Chartrand, *Manitoba's Metis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, University of Saskatchewan, 1991).
35. S.C. 1879, c. 31.
36. For example, Duke Redbird, *We Are Metis* (Toronto: Ontario Metis and Non-Status Indian Organization, 1980), notes in this regard (at 1): "People of mixed heritage had existed from at least the mid-sixteen hundreds or nine months from the time the first white man set foot in North America."

37. Nicholas Denys, *The Description and Natural History of the Coasts of North America (Acadia)*. The translation referred to was produced in 1908 by the Champlain Society. The last chapter of the translation is reproduced in H.F. McGee, ed., *The Native Peoples of Atlantic Canada* (Ottawa: Carleton University Press, 1983), at 38-44. The author notes (at 43) that the children produced by the union of the French and the Indian women were taken into the family of a Micmac man who would marry her once she was no longer involved with the white man.
38. R.E. Gaffney, G.P. Gould, A.J. Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (Fredericton: New Brunswick Association of Metis and Non-Status Indians, 1984), at 62.
39. Morris, *supra*, note 14.
40. Purich, *supra*, note 10, at 9-11.
41. Thomas Flanagan, "The Case Against Metis Aboriginal Rights", *Canadian Public Policy* IX/3 (1983), 314. In a later article, however, he expands on his earlier views, acknowledging certain rights to land accruing to Metis as derivative of Indian title but apparently not equal to it. See Thomas Flanagan, "The History of Metis Aboriginal Rights: Politics, Principle, and Policy", *Can. J. Law & Soc.* 5 (1990), 71.
42. Schwartz, *supra*, note 9.
43. R.S.A. 1970, c. 233, (revised 1982, c.26) s. 2. This statute has since been repealed as part of a 1990 package of Metis legislation known collectively as the "Alberta Metis Settlements Accord". See note 56, *infra*.
44. Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", in *Canada and the New Constitution: The Unfinished Agenda*, ed. S.M. Beck and I. Bernier, vol.1 (Montreal: Institute for Research on Public Policy, 1983), 227 at 254.
45. William Pentney, *The Aboriginal Provisions in the Constitution Act, 1982* (Saskatoon: University of Saskatchewan, 1987), at 100.

46. Bell, *supra*, note 30, at 352. Her listing of the various terms for Aboriginal people includes Indians, status Indians, non-status Indians, treaty Indians, non-treaty Indians, Inuit, Metis, half-breeds, Metis nation, registered Indians, non-registered Indians, and urban Indians.
47. *Ibid.*, at 376.
48. *Ibid.*, at 379.
49. Lussier, *supra*, note 4, at 12. In this regard he notes: "If Stanley is correct, then the bonds should have kept the many Métis cultural groups united against adversity. The events of 1870 and 1885 proved this to be wrong. Many Métis and half-breeds did not side with Riel in both insurrections. In 1870, the Métis of White Horse Plains, St. Laurent and the half-breeds of Kildonan did not support Riel. Regarding 1885, Fr. Morice argues that the Métis were coerced to fight or meet immediate death at the hands of Riel's soldiers." Parliamentary and court testimony associated with the Red River troubles of 1812-1819 lend support to both sides of the debate about whether the historical Metis thought of themselves as a distinct entity. The testimony of three such commentators is briefly referred to in Jennifer Brown, "Woman as Centre and Symbol in the Emergence of Metis Communities", *Can. J. Native Studies* 3 (1983), 39 at 43. See also her "Introduction", co-written with Jacqueline Peterson, to the book they edited, *The New Peoples, Being and Becoming Metis in North America* (Winnipeg: University of Manitoba Press, 1985).
50. Sanders, *supra*, note 44, at 255.
51. The prime example is *R. v. Laprise*, [1978] 6 W.W.R. 85 (Sask. C.A.), which was followed in *R. v. Budd*; *R. v. Crane*, [1979] 6 W.W.R. 450 (Sask. Q.B.).
52. A good example is *The Queen v. Thomas Chevrier*, [1989] 1 C.N.L.R. 128 (Ont. Dist. Ct.).
53. *Supra*, note 43.
54. S.A. 1990, c. M-14.3.
55. *Ibid.*, s. 1(j).

56. The *Metis Settlements Act* provides the framework for comprehensive but delegated powers of self-government for the Metis settlements. It is part of a package of legislation intended to address a number of long-standing problems. The other statutes are the *Metis Settlements Land Protection Act*, S.A. 1990, c. M-14.8; the *Metis Settlements Accord Implementation Act*, S.A. 1990, c. M-14.5; and the *Constitution of Alberta Amendment Act*, 1990, S.A. 1990, c. C-22.2. The latter will not be proclaimed until the Parliament of Canada passes a parallel resolution in order to implement the constitutional change.
57. Some of these approaches are set out briefly in Bradford W. Morse, "The Aboriginal Peoples in Canada", in *Aboriginal Peoples and The Law: Indian, Metis and Inuit Rights in Canada*, ed. B. Morse, revised edition (Ottawa: Carleton University Press, 1989), at 3. Brian Slattery discusses the question in "Understanding Aboriginal Rights", *Can. B. Rev.* 66 (1987), 727 at 757: "In determining whether or not a certain group of people qualifies as "native", regard should be had to a variety of factors, such as: (a) the self-identity of its members, as shown in their actions and statements; (b) the culture and way of life of the group; (c) the existence of group norms or customs similar to those of other aboriginal peoples; and (d) the genetic composition of the group."
58. See note 32, *supra*.
59. S.C. 1869, c. 6, s. 4 (31-32 Vict.).
60. S.C. 1876, c. 18.
61. R.S.C. 1970, c. I-16, s. 12.
62. Morris, *supra*, note 14.
63. S.C. 1951, c. 29, s. 11.
64. Dickason, *supra*, note 19.
65. The federal government's own report documents some of the problems: Indian and Northern Affairs Canada, *Lands, Revenues and Trusts Review: Phase II Report* (Ottawa: Ministry of Supply and Services, 1990), at 134-35:

Many communities visited point out that Bill C-31 has not been altogether successful in eliminating discrimination from the *Indian Act*. In fact, a number of discriminatory provisions remain in the Act or were created as a result of Bill C-31.

Under the revised Act, the children of reinstated Indian women must marry or have a child by a status Indian in order to pass on status to their own children. This is not true for Indian men, even if they have married a non-Indian woman. The children of these marriages can pass on status regardless of who they marry.

Moreover, the illegitimate male and female offspring of male status Indians are treated differently under the Act. Illegitimate males can pass on status to their children from a marriage to a non-status woman, but illegitimate women cannot pass on status if they marry or have a child by a non-status man. Some Indian communities have maintained that as a result of this provision, non-Indian children adopted by status Indians may have greater rights than children of Indian ancestry reinstated or registered under Bill C-31.

66. *R. v. McPherson*, *supra*, note 7, at 149, per Gregoire J.
67. For a more detailed discussion see Bradford W. Morse, *Aboriginal Self-Government in Australia and Canada* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985).
68. Such an approach would also correspond to the basic policy adopted in the United States regarding who will be considered to be an Indian in law. "Recognizing the diversity included in the definition of Indian, there is nonetheless some practical value for legal purposes in a definition of Indian as a person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by his or her tribe or community." (Rennard Strickland et al., ed., *Felix Cohen's Handbook of Federal Indian Law* (Charlottesville: The Michie Company Law Publishers, 1982), at 20.)
69. William Pentney notes the difficulties in this regard: "The characterization of legislation for purposes of division of powers purposes is a notoriously difficult task. The concurrent and occasionally overlapping federal and provincial legislative jurisdictions which underpin the federal system create a complex framework, whose contours evolve and adapt over time. In

relation to s. 91(24) these problems are compounded by confusion over the dual aspects of head 24 - "Indians" and "Lands reserved for the Indians" - the evolving make-up and distribution of the group involved, and the relevance for this head of power of the pre-existing relationship between aboriginal peoples and the British Crown." ("Aboriginal Peoples and Section 91(24) of the Constitution Act, 1867", unpublished background paper prepared for the Canadian Bar Association Special Committee on Native Justice, April 1988, at 19-20.)

70. [1974] S.C.R. 1349, at 1359: "In my opinion, the exclusive legislative authority vested in Parliament could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown 'lands reserved for the Indians'."
71. [1976] 1 S.C.R. 170.
72. *Ibid.*, at 207.
73. *Ibid.*, at 206-07.
74. Schwartz, *supra*, note 9, at 177.
75. *In the Matter of a Reference as to Whether the Term "Indians" in Head 24 of section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province Of Québec*, [1939] S.C.R. 104, commonly referred to as *Re Eskimos*.
76. The case is discussed by Richard Diubaldo, "The Absurd Little Mouse: When Eskimos Became Indians", *J. Can. Studies* 16 (1981), 34. The author informs us (at 36) that the Justice Department, and especially its external counsel, were of the opinion that the federal case was not a strong one and that it did not seem wise to incur the expense of bringing it before the Supreme Court.
77. [1973] S.C.R. 313.
78. The *Calder* appeal was ultimately dismissed, but on procedural grounds. Six judges of the Supreme Court agreed that Aboriginal title was alive and well as a concept in Canadian law. Where they disagreed was regarding its origins and whether pre-Confederation legislation in British Columbia had extinguished it. Subsequently, in *Guerin v. The Queen* [1984] 2 S.C.R. 335,

seven Supreme Court justices recognized it as a legal right. Former Chief Justice Dickson was quite explicit in this connection, stating (at 376) that in *Calder* "this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands." Significantly, the Canadian government reversed its previous policy position denying the existence of Aboriginal rights immediately following *Calder* and reinstituted the treaty-making process under the term 'comprehensive claims'.

79. The pattern of federal reluctance to assume its constitutional obligations regarding Indians is outlined in greater detail in Bradford W. Morse, "Governmental Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*", in *Aboriginal Peoples and Government Responsibility*, ed. D. Hawkes, *supra*, note 22, at 59-91.
80. A more detailed description of these methods is outlined in Linda Rayner, "The Creation of a 'Non-Status' Indian Population by Federal Government Policy and Administration", unpublished research paper prepared for the Native Council of Canada, 1978.
81. The comprehensive claims process inaugurated in 1973 did not demand provincial participation in the actual negotiation process. However, the federal government argued that since most unoccupied Crown land is owned by the Crown in right of the province under section 109 of the *Constitution Act, 1867*, the *Constitution Act, 1930*, or specific terms of union, provincial co-operation was required from the outset. The argument was bolstered by the advent of subsection 35(3) of the *Constitution Act, 1982*, the effect of which was to give these land settlements constitutional force. This buttressed the requirement in the eyes of the federal government that the provinces must participate in negotiation and ratification.
82. At least the federal government now acknowledges the existence of actual 'rights' covered by section 35. Immediately following the entrenchment of section 35, the federal government apparently believed that there was essentially nothing in section 35 to be affirmed and recognized. In short, it was an 'empty box'. Douglas Sanders captures the essence of the early federal position in the following anecdote: "Ian Binnie, then the leading figure in the federal Department of Justice, was asked what rights he thought were protected by section 35. The question was put at a Ministerial level meeting held in preparation for one of

the First Ministers' Conferences on aboriginal constitutional matters. Binnie gave one example, Indians had the right to surrender land. His statement was greeted with laughter, it was so absurd. The federal government had an "empty box" theory. A box of rights had been protected by section 35, but unfortunately the box was empty." ("The Supreme Court of Canada and the 'Legal and Political Struggle' Over Indigenous Rights", *Can. Ethnic Studies* XXII/3 (1990), 122 at 125.

83. See, for example, the *Sechelt Indian Government District Enabling Act*, S.B.C. 1987, c.16.
84. These various pieces of legislation are described in J. Leslie and R. Maguire ed., *The Historical Development of the Indian Act*, 2nd ed. (Ottawa: Indian and Northern Affairs Canada, 1978), at 13-50.
85. These developments are outlined in John Tobias, "Protection, Assimilation, Civilization: An Outline History of Canada's Indian Policy", in *Sweet Promises: A Reader on Indian-White relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991), 127.
86. The editors of *The Historical Development of the Indian Act*, *supra*, note 84, hint at this (at 30) where they state: "As a result of the Manitoulin experiment and similar projects in the United States, separation of Indians from 'white' society, as an end in itself, was not viewed as a desirable policy." They note (at 28) that in the first of the enfranchisement acts fee simple title to up to fifty acres of allotted land plus a relatively large sum of money were used as inducements to coax voluntary enfranchisement.

The editors of *Felix Cohen's Handbook*, *supra*, note 68, describe allotment (at 128) as one of the elements in the policy of assimilation adopted in the United States as a way of teaching Indians the value of private property and of freeing 'surplus' Indian land for non-Indian settlement. Allotment in that country had a long and tragic history that was presumably familiar to Canadian policy makers. That history is briefly described (at 129-30) as follows: "The allotment concept was not new; Indian lands had been allotted as early as 1633, and the allotment concept had been developing and gaining popularity for some time... Later, allotments were used as a method of terminating tribal existence. Allottees surrendered their interest in the tribal estate and became citizens subject to state and federal

jurisdiction. During the 1850s this break-up of tribal lands and tribal existence assumed a standard pattern. Such experiments in allotment served as models for later legislation."

The major attempt to destroy the basis of separate tribal existence in the United States occurred in 1887 with the passage of the *General Allotment Act* (25 U.S.C. ss. 331-34, 339, 341, 342, 349, 354, 381), known as the Dawes Act. It provided for compulsory allotment of communally held tribal lands. The editors of *Felix Cohen's Handbook* state (at 132) that "Eastern philanthropists wanted to civilize the Indian; western settlers wanted Indian land." The allotment policy and process are described in Janet A. McDonnell, *The Dispossession of the American Indian 1887-1934* (Bloomington: Indiana University Press, 1991).

87. S.C. 1857, c. 26 (20 Vict.). According to John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change", in *Sweet Promises, supra*, note 85, 145, at 147-48, the passage of the Act had three negative consequences:
- it created a constitutional inconsistency by allowing a portion of the communally held and Imperially protected Indian land to be carved out following enfranchisement without following the procedures set out in the *Royal Proclamation of 1763*;
 - it marked the passage from protection of Indian communal life to assimilation of Indians on a piecemeal basis and the breaking up of the communal land base; and
 - it caused a crisis in the relationship between tribal leaders and colonial authorities due to the breakdown of the generally progressive partnership in development that had existed since the 1830s involving the agents of the department, missionaries and tribal councils.
88. A male Indian over 21, of good morals, sober and literate, could become enfranchised upon being examined and pronounced fit by three commissioners. Such a person would receive a portion of the band lands within the reserve and his share of band moneys. The right to actually exercise the franchise depended upon meeting the requirements of the day in federal and provincial legislation in terms of property ownership. Thus, there was no automatic right to vote. A wife and any unmarried, minor children would automatically be enfranchised as a result of the male's application.

89. *Supra*, note 59.
90. *Supra*, note 60.
91. The developments up until 1951 are described in Rayner, *supra*, note 80, at 19-36.
92. John Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885", in *Sweet Promises*, *supra*, note 85, supports this contention (at 213) as follows:
- Those who propagate the myth would have us believe that Canada began to negotiate treaties with the Indians of the west in 1871 as part of an overall plan to develop the agricultural potential of the west, open the land for railway construction, and bind the prairies to Canada in a network of commercial and economic ties. Although there is an element of truth to these statements, the fact remains that in 1871 Canada had no plan to deal with the Indians and the negotiation of treaties was not at the initiative of the Canadian government but at the insistence of the Ojibwa Indians of the North-West Angle and the Saulteaux of the tiny province of Manitoba. What is ignored by the traditional interpretation is that Yellow Quill's band of Saulteaux turned back settlers who tried to go west of Portage la Prairie, and after other Saulteaux leaders insisted on the enforcement of the Selkirk Treaty or, more often, insisted upon making a new treaty. Also ignored is the fact that the Ojibwa of the North-West Angle demanded rents and created the fear of violence against prospective settlers who crossed their territory or made use of the territory if Ojibwa rights to their lands were not recognized. This pressure and fear of resulting violence is what motivated the government to begin the treaty-making process.
- It is worth noting that the same argument could be made regarding the Metis of Manitoba, as the federal government negotiated the creation of a new province only because of pressure from the Provisional Government.
93. This is attested to in the accounts provided by Alexander Morris, *supra*, note 14.
94. That the pressure came from the Indians is supported by Dickason, *supra*, note 15, at 275; by John Taylor, "Canada's North-West Indian Policy in the 1870s: Traditional Promises and

Necessary Innovations", in *Sweet Promises*, *supra*, note 80, at 207; and in Peter A. Cumming and Neil H. Mickenberg, ed., *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing Co. Ltd., 1972), at 120-21.

95. *Supra*, note 75.
96. For a recent review of this matter as it has related to the Innu see Donald MacRae, Report to the Canadian Human Rights Commission on the complaint of the Innu Nation, August 18, 1993.
97. This is especially the case with regard to Flanagan in his later article on Metis, "The History of Metis Aboriginal Rights", *supra*, note 41.
98. *Supra*, note 9.
99. Purich, *supra*, note 10, makes a similar point (at 62): "The argument against Flanagan is that no matter what Macdonald's intentions were, he did in fact recognize Metis rights by the very act of entering into a land settlement with them. In contract law, motive is seldom relevant. The effect of a contract is determined by its wording, not by the motives of the parties signing it. Similarly, the effect of legislation (like the Manitoba Act) is determined by its wording, not by the motives of the legislators. Only if there is considerable confusion in the wording will the courts try to determine the effect by looking to see what the government intended."
100. *Reference re Section 94(2) of the Motor Vehicle Act R.S.B.C. 1979, c. 288, as amending the Motor Vehicle Amendment Act, 1982, 1982 (BC), c. 36*. [1985] 2 S.C.R. 486. The Supreme Court rejected the procedural interpretation placed on section 7 of the Charter by senior officials of the federal Department of Justice who had been involved in its drafting.
101. Clem Chartier, "'Indian': An Analysis of the Term Indian as Used in section 91(24) of the *British North America Act, 1867*", *Sask. L. Rev.* 43 (1978-79), 37.
102. Schwartz, *supra*, note 9.
103. The historical material referred to by Chartier was addressed in two cases. Ferris J. from the Saskatchewan Provincial Court

comes to conclusions opposite to those of Chartier, concluding that mixed-blood persons were not section 91(24) Indians in 1867 in *R. v. Genereaux*, [1982] 3 C.N.L.R. 95. Ayotte J. of the Territorial Court of the Northwest Territories supports Chartier's conclusions in *R. v. Rocher*, [1982] 3 C.N.L.R. 122.

104. *R. v. Genereaux*, *ibid.*, at 104.
105. *Supra*, note 14.
106. See sources cited at notes 14-17, *supra*.
107. S.C. 1850, c. 42 (13-14 Vict.).
108. Tobias, *Sweet Promises*, *supra*, note 85, at 129.
109. Dickason, *supra*, note 19, states (at 250): "With so much property at stake, it became important to define the term 'Indian'. The 1850 Act for Lower Canada undertook the task without consulting Amerindians...It was quickly decided that this [definition] was too inclusive."
110. S.C. 1861 c. 14, s. 11 (23 Vict.).
111. *An Act for the Gradual Civilization of the Indian Tribes of the Canadas*, *supra*, note 87.
112. 1859, c. 9 (22 Vict.).
113. S.C. 1868, c. 42 (31 Vict.).
114. *Supra*, note 59. The Act also provided in section 6 that Indian women marrying "any other than an Indian" would lose Indian status, as would their descendants. Although they would lose residency rights and status, they would nonetheless still be allowed to share in band moneys, and their treaty rights were unaffected.
115. *Supra*, note 60.
116. *Supra*, note 63.
117. (1894) 1 Terr. L. R. 492 (NWTSC en banc) is the primary support for this proposition, although the decision is not without some ambiguity in this respect.

118. *Supra*, note 34.
119. S.C., 1874, c. 20.
120. *Supra*, note 35.
121. Order in Council, December 14, 1888, reproduced in Flanagan, "The History of Metis Aboriginal Rights", *supra*, note 41.
122. Order in Council, May 6, 1899, reproduced in Flanagan, *ibid*.
123. S.C. 1899, c. 16, s.4.
124. Flanagan, "The History of Metis Aboriginal Rights", *supra*, note 41, at 84: "The derivative nature of Metis rights meant that they could not be extinguished independently but only after the extinguishment of the Indian title in the same region."
125. As in the 1888 letter from the Deputy Minister of the Interior reproduced in Flanagan, *ibid*, at 80: "I may further say, however, that when and so soon as the Government shall make arrangements to treat with the Indians for the cession of the territories in question the Minister will take the necessary steps to extinguish at the same time the Indian title of the Half Breeds who were living within the territories on the 15th of July, 1870."
126. This change in language is attributed to J.A.J. McKenna, personal secretary to the Minister of the Interior, who states in an official letter in 1899 (Flanagan, *ibid*, at 82): "It is, therefore, clear that whatever rights the halfbreeds have, they have in virtue of their Indian blood. Indian and halfbreed rights differ in degree, but they are obviously coexistent. Halfbreed rights must exist until the Indian title is extinguished, and they should properly be extinguished at the same time. The principle underlying the Government's policy respecting Indians, as embodied in various treaties, may thus be stated:- when changing conditions incident to advancing settlement interfere with their mode of life and ordinary means of livelihood it is politic and equitable - apart altogether from any title they may have in the land - to offer them some degree of compensation. The same principle is, and should be, the basis of its halfbreed policy. When the Indian rights in a certain territory are extinguished the halfbreed rights should be extinguished; and if the Government fails as it has failed in the past to pursue such a policy then the

halfbreed right should be held to exist up until the date at which it is extinguished."

127. This began with *An Act for the gradual enfranchisement of Indians, supra*, note 59. The 1985 *Indian Act* amendments in Bill C-31 were a partial attempt to correct this injustice.
128. *An Act respecting Indians and Indian Lands, supra*, note 110.
129. (1888) 14 App. Cas. 46 (PC).
130. *Ibid.*, at 54.
131. 4th ed. (St. Paul: West Publishing Company, 1968), at 1300 and 1713 respectively.
132. See, for example, *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Delgamuukw et al. v. A.G.B.C.*, [1993] 5 W.W.R. 97 (B.C. Court of Appeal).
133. See *Calder, supra*, note 77.
134. *Baker Lake v. Minister of Indian and Northern Affairs*, [1980] 1 F.C. 518.
135. Douglas Sanders, "Aboriginal peoples and the Constitution", *Alta. L. Rev.* (1981), 410 at 421.
136. *Supra*, note 123. For a discussion of the extensive and dishonourable, if not fraudulent, dealings with scrip by speculators and both the federal and Manitoba governments see the excellent historical research of Doug Sprague generally, including "Government Lawlessness in the Administration of Manitoba Land Claims, 1870 -1887", *Man. L. J.* 10 (1979), 415, and Chartrand, *supra*, note 34.
137. "Having 'Indian Title', however, is not necessarily the same thing as being an Indian." Schwartz, *supra*, note 7, at 243.
138. In a speech in the House of Commons in 1885, Sir John A. Macdonald is reported as saying the following: "Whether they [the Metis] had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of the Province...1,400,000 acres would be quite sufficient for the purpose of compensating these men for what was called the extinguishment of the Indian

title. That phrase was an incorrect one, for the half-breeds did not allow themselves to be Indians [nor of course did the Metis generally consider themselves to be Indians]." (House of Commons, *Debates*, July 6, 1885, quoted in Flanagan, "The History of Metis Aboriginal Rights", *supra*, note 37, at 74.)

139. Schwartz, *supra*, note 9, at 245.
140. In the House of Commons, 15 years before the speech cited by Flanagan, "The History of Metis Aboriginal Rights", *supra*, note 41, it is reported that Sir John A. Macdonald made the following reference to the "half-breed" grants just two months before Manitoba's entry into Confederation: "Those half-breeds had a strong claim to the lands, in consequence of their extraction, as well as from being settlers. The Government therefore proposed for the purpose of settling those claims, this reserve of 1,400,000 acres....No land would be reserved for the benefit of white speculators, the land being given only for the actual purpose of settlement. The conditions had to be made in the Parliament who would show that care and anxiety for the interest of those tribes which would prevent that liberal and just appropriation from being abused." (House of Commons, *Debates*, May 4, 1870, quoted in Native Council of Canada, *A Statement of Claim*, *supra*, note 8, at 26.)
141. *Supra*, note 117.
142. This is now accepted in Canadian law, the point having been made by Kenneth Lysyk (now Mr. Justice Lysyk), in "The Unique Constitutional Position of the Canadian Indian", *Can. B. Rev.* 45 (1967), 513 at 515: "...there is nothing in head 24 to suggest that legislative authority over Indians, as such, hinges on whether or not the statute in question is sought to be applied to an Indian on Indian lands as opposed to an Indian who is not on such lands."
143. Noel Lyon, "Constitutional Issues in Native Law", in *Aboriginal Peoples And The Law*, ed. B. Morse, *supra*, note 57, 408 at 429.
144. *Ibid.*
145. This would to some extent make the exclusion of half-breeds in section 3 (e) of the 1876 *Indian Act* (*supra*, note 60) equivalent to section 88 of that version of the Act whereby enfranchised Indians, upon receiving the letters patent to their portion of the

reserve lands allotted to them in fee simple, "shall no longer be deemed Indians within the meaning of the laws relating to Indians" (except for certain purposes related primarily to band moneys and treaty annuities). Enfranchised Indians did not at that time lose their right to participate in band councils, however.

146. In *R. v. Rocher*, *supra*, note 103, Ayotte J. refers to the hunting and fishing rights afforded in the Northwest Territories to Metis, noting (at 133): "It may be that the approach taken by the present government to their [Metis] land claim negotiation, at least in the western Northwest Territories, is an implied recognition of that right."

147. *Supra*, note 4.

148. Sally Weaver, "Federal Difficulties with Aboriginal Rights Demands", in *The Quest For Justice*, ed. M. Boldt, J.A. Long, and L. Littlebear (Toronto: University of Toronto Press, 1985), 139 at 146.

Vine Deloria Jr., a Sioux Indian, describes the same phenomenon more trenchantly in *Custer Died For Your Sins: An Indian Manifesto* (New York: Avon Books, 1970), noting (at 10): "The more we try to be ourselves the more we are forced to defend what we have never been. The American public feels most comfortable with the mythical Indians of stereo-type land who were always THERE. These Indians are fierce, they wear feathers and grunt. Most of us don't fit this idealized figure since we grunt only when overeating, which is seldom."

In the 1942 edition of *Felix Cohen's Handbook of Federal Indian Law* (Washington: U.S. Government Printing Office, 1942), Nathan Margold puts the issue of traditional 'Indianness' and adaptation to settler societies in historical perspective as follows in the Introduction (at xxvii): "...As I have elsewhere observed, the groups of human beings with whom Federal Indian Law is immediately concerned have undergone, in the century and a half of our national existence, changes in living habits, institutions, needs and aspirations far greater than the changes that separate from our own age the ages for which Hammurabi, Moses, Lycurgus, or Justinian legislated. Telescoped into a century and a half, one may find changes in social, political and property relations which stretch over more than thirty centuries of European civilization."

149. *Supra*, note 30, at 368.

150. Bell, *ibid.*, at 368-69. The United States Supreme Court for a brief time entertained a similar notion regarding what constitutes an 'Indian' lifestyle, ruling in *United States v. Joseph* 94 U.S. 614 (1877) that the Pueblo Indians of New Mexico were not really 'Indians' in the legal sense for purposes of federal trust protection of their lands. The fact that the Pueblos held their land in fee simple and followed a more 'civilized' lifestyle than their semi-nomadic Apache and Navajo neighbours weighed heavily in the Court's analysis. The Court reversed itself following New Mexico's admission to statehood in 1912 in the landmark case of *United States v. Sandoval* 231 U.S. 28 (1913), holding (at 39) that the Pueblos were "Indians in race, customs, and domestic government". As Indians in the legal sense Pueblo lands fell within federal trust protection, despite the long Pueblo history of fee simple ownership (and despite the fact they were U.S. citizens, unlike most other Indians within the territorial limits of the United States at that time).
151. The right of tribes to change under American Indian law is dealt with by Charles Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987), at 68-75. He notes in particular (at 69): "The modern cases have elaborated upon the promise of a right to change in a wide variety of contexts. The recognition of Indian tribes as living, expanding, and adaptive societies amounts to one of the leading developments of the modern era because of its rejuvenating effect on tribalism."
152. [1990] 1 S.C.R. 1075, at 1093 per Dickson, C.J. and La Forest J.:
Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slaterry's expression...the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.
153. *Supra*, note 103.
154. *Supra*, note 117.

155. R.S.C. 1886, c. 43. The definition of Indian in that Act was the same as that in the 1876 version (see text at note 115, *supra*). The Court described the mixed-blood person as follows (*supra*, note 117 at 493): "The person goes by the name of Henry Bear. The evidence shows that he is a half-breed, his father having been a Frenchman and his mother an Indian, that he belongs to and is a member of Mus-cow-e-quan's Band of Indians and lives on his reserve and has taken treaty money for a number of years past...".
156. *Supra*, note 117, at 494.
157. *Ibid.*
158. *Ibid.*
159. It should also be noted, however, that the 1892 version of the *Criminal Code* (S.C. 1892, c. 29) contained a similar provision in s. 98 against inciting Indians or "half-breeds". By the 1906 revision, the *Indian Act* (R.S.C. 1906, c. 81) no longer contained this prohibition.
160. *Supra*, note 117, at 495.
161. (1900) 5 Terr. L. R. 580 (N-WTSC).
162. (1914) 23 C.C.C. 47 (NS Co.Ct.).
163. Confirmed in the *Constitution Act, 1930*.
164. *Saskatchewan Natural Resources Transfer Act*, S.C. 1930, c. 41.
165. Unreported, Saskatchewan Magistrate's Court, October 1, 1971. It is reproduced in B. Slattery and S. Stelck, *Canadian Native Law Cases 7* (Saskatoon: University of Saskatchewan Native Law Centre, 1988), 391.
166. S.S. 1967, c. 78.
167. Slattery and Stelck, *supra*, note 165, at 392.
168. *Ibid.*, at 396.
169. (1972) 32 D.L.R. (3d) 617, at 622.
170. *Supra*, note 51.

171. *Ibid.*, at 85.
172. R.S.C. 1927, c. 98.
173. *Supra*, note 47, at 88.
174. *R. v. Budd*; *R. v. Crane* [1979] 6 W.W.R. 450 (Sask. QB). Jack Woodward, *Native Law* (Toronto: Carswell, 1989) notes as follows (at 9): "The reasoning in the *Laprise* decision is questionable on two fronts: on the first because the 1927 Indian Act did not deal with registration, and, on the second, because it does not acknowledge that there are many different meanings for the word 'Indian', including a constitutional sense. It is beyond Parliament's jurisdiction to define the terms used in the Constitution, including the term 'Indian'." For a discussion of this issue see A.J. Jordan, "Who is an Indian?" *C.N.L.B.* 1 (1977), 22.
175. *Supra*, note 103.
176. *Ibid.*, at 103.
177. *Supra*, note 101.
178. *Supra*, note 113.
179. *Supra*, note 103, at 107.
180. *Ibid.*, at 105.
181. *Supra*, note 103.
182. R.S.C. 1970, c. F-14.
183. *Supra*, note 103, at 124.
184. *Ibid.*, at 131.
185. *Supra*, note 52.
186. *Ibid.*, at 130.
187. *Supra*, note 7.
188. *Ibid.*, at 145, per Gregoire J.
189. *Ibid.*, at 146.

190. *Ibid.*, at 147.
191. *Ibid.*, at 150.
192. Gregoire J. took them from an article written by Professor Slattery to which the Supreme Court of Canada had referred in *R. v. Sparrow*, *supra*, note 152, in which Professor Slattery sets out the following criteria (derived largely from the *Baker Lake* case, *supra*, note 134):
- (1) The parties asserting aboriginal title must constitute an organized group of native people;
 - (2) The group must possess the lands claimed;
 - (3) The group must have possessed the lands for a substantial period;
 - (4) The lands must form part of the Indian Territories. (Slattery, *supra*, note 57, at 756-61.)
193. *Supra*, note 7, at 152.
194. *Ibid.*
195. *Ibid.*, at 153.
196. *Ibid.*
197. *Ibid.*, at 154.
198. *R. v. Ferguson*, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct. (Crim. Div.)).
199. *R. v. Fowler*, [1993] 3 C.N.L.R. 178 (N.B. Prov. Ct.).
200. S.A. 1984, c. W-9.1.
201. *Supra*, note 198, at 152-153.
202. *R. v. Laprise*, *supra*, note 51, and *R. v. Budd*; *R. v. Crane*, *supra*, note 51.
203. *Supra*, note 198, at 156, quoting from *R. v. Sparrow*, [1990] 3 C.N.L.R. at 181.
204. *Ibid.*
205. *Supra*, note 52.

206. *Supra*, note 199, at 181.
207. Canada, *Statement of the Government of Canada on Indian Policy* (Ottawa: Queen's Printer, 1969). For an excellent discussion of the white paper and its aftermath, see Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981) and Roger Gibbins and Rick Ponting, *Out of Irrelevance: A Social and Political Introduction to Indian Affairs in Canada* (Toronto: Butterworths, 1980).
208. Ottawa: Ministry of Supply and Services, 1979, at 16.
209. The events leading up to the patriation of the Constitution from the Aboriginal perspective are outlined by Douglas Sanders, "The Indian Lobby and the Canadian Constitution, 1978-82", in *And No One Cheered: Federalism, Democracy and the Constitution Act*, ed. K. Banting and R. Simeon (Toronto: Methuen, 1983), 301. For further information regarding the NCC involvement and the MNC separation, see Bradford W. Morse and Robert K. Groves, "Canada's Forgotten Peoples: The Aboriginal Rights of Metis and Non-Status Indians" *Law & Anthropology* 2 (1987), 139 at 154-56.
210. Although the official stance of the federal government was to focus attention on the actions of the government of Newfoundland, it was the dramatic refusal of Indian MLA Elijah Harper to alter the procedural rules of the Manitoba legislature and the strong public support for his gesture that actually scuttled whatever chance the deal had of being ratified.
211. *Native Women's Association of Canada v. The Queen*, [1992] 4 C.N.L.R. 71 (F.C.A.), affirming [1992] 4 C. N.L.R. 59 (F.C.T.D.). Leave to appeal was granted by the Supreme Court of Canada on March 4, 1993.
212. Royal Commission on Aboriginal Peoples, *Partners in Confederation. Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993).
213. *Supra*, note 132.
214. *Oxford Universal Dictionary on Historical Principles*, 3rd ed. (London: Clarendon Press, 1955), at 1006.

215. See, for example, Article 1(2) of the *International Covenant on Civil and Political Rights* and Article 1(2) of the *International Covenant on Economic, Social and Cultural Rights*.
216. Bell, *supra*, note 30, at 352.
217. *A.G. Canada v. Lavell*, *supra*, note 70.
218. Woodward, *supra*, note 174, at 56. Schwartz, *supra*, note 9, disagrees, stating (at 247) that "the section confers no rights on Métis....It may be that on April 17, 1982 the Métis had no aboriginal or treaty rights." This issue will likely be resolved when and if the plaintiffs in *Dumont et al. v. Attorney General of Canada and Attorney General of Manitoba* ever obtain a decision on the merits, as opposed to the series of judgements on federally initiated procedural matters that have consumed a number of years.
219. This is the wording from section 31 of the *Manitoba Act*, S.C. 1870, c. 3.
220. Bell, *supra*, note 30, at 369.
221. For further analysis and argument on this point see Morse, *supra*, note 79, and Alan Pratt, "Federalism in the Era of Aboriginal Self-Government" in *Aboriginal Peoples and Government Responsibility*, ed. D. Hawkes, *supra*, note 22, at 19.
222. R.S.C. 1985, c. F-7. It would also encompass the Aboriginal Fisheries Agreement Regulation, at least once it is amended so as not to be limited to recognized bands under the *Indian Act* and tribal councils.
223. This ministerial assignment passed on to successive ministers of justice until the prime minister once again responded to complaints from MNC and NCC that the position of justice minister inevitably caused a conflict of interest with the role of interlocutor since the justice minister as attorney general for Canada was the defendant in all litigation affecting the federal Crown. As such, the overarching obligation to protect the Crown's legal interests was continually intruding in the role of advancing the interests of these distinct peoples.
224. For an initial effort see Morse, *supra*, note 79.

225. It should also be noted that recent developments in international law provide additional arguments, as does the argument based on the inclusion within Canadian common law of the inherent right to Aboriginal self-government. This latter argument, however, inevitably leads back to the arguments raised in the text, since common law recognition of inherent self-government would lead to the addition of self-government to the other rights recognized and affirmed in section 35 of the *Constitution Act, 1982*.
226. *Supra*, note 78.
227. *Supra*, note 152.
228. *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751.
229. For further discussion on this point see, Pratt, *supra*, note 221.
230. The earliest one known to the authors that was entirely related to Aboriginal issues is *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, 1891, 54-55 Vic., Cap. 5 (Canada) and 54-55 Vic., Cap. 3 (Ontario). This was later followed by the 1924 Indian Lands Agreement Act passed by the legislature of Ontario and the federal Parliament to implement an agreement dealing with the sale of reserve lands after surrender to the Crown in right of Canada so as to avoid problems created by the Privy Council's decision in the *St. Catherine's Milling & Lumber Co.* case, *supra*, note 129. The thrust of this Act is now contained in the 1986 Indian Lands Agreement finally passed by Ontario in 1989. The most recent such initiative relates to the Sechelt First Nation which obtained general enabling legislation from Parliament to move out from under the *Indian Act* while subsequently receiving added authority as a public, district government under British Columbia law through the *Sechelt Indian Band Self-Government Act* S.C. 1986, c. 27, and the *Sechelt Indian Government District Enabling Act* S.B.C. 1987, c.16, respectively.
231. For the full array of the Alberta Metis legislation, see note 56, *supra*.
232. This is at least arguably the case with a long list of statutes that have been passed by the Quebec National Assembly to

implement or advance elements of the James Bay and Northern Quebec Agreement.

- 233. 4-5 Edward VII, c. 3 (Can).
- 234. See note 56, *supra*.
- 235. For further information on these leaders, see Murray Dobbin, *The One-and-A-Half-Men: The Story of Jim Brady and Malcolm Norris, Metis Patriots of the 20th Century* (Vancouver: North Star Books, 1981).
- 236. *Supra*, note 24.
- 237. Alan Pratt makes an interesting argument on this issue prior to the Supreme Court of Canada's ruling in the *Sparrow* case, *supra*, note 79.
- 238. *Delgamuukw v. The Queen*, [1991] 8 W.W.R. 97 (B.C.S.C.).
- 239. As related by the Rt. Hon. Joe Clark in May of 1992.
- 240. See, for example, *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.

THE MÉTIS AND 91(24): IS INCLUSION THE ISSUE?

by Don McMahon and Fred Martin

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EXECUTIVE SUMMARY

This paper examine ways in which Métis communities in Canada can preserve and enhance their collective existence as a people. The first issue addressed is the meaning of the term 'Métis'. The various communities that might be included in this term are considered, and the perspectives of national Aboriginal political organizations on the identity of Métis communities is discussed. The paper then considers strategies by which Métis communities might sustain a distinctive Aboriginal existence within the context of existing Canadian institutions. First is inclusion of Métis people within the category of Indians as defined in section 91(24) of the *Constitution Act, 1867*. This would place Métis exclusively under the authority of the Parliament of Canada.

Inclusion in section 91(24) has been a long-standing demand of many Métis organizations. The historical and legal literature dealing with this issue is examined at some length. The conclusion is that although 91(24) may be of some use in advancing Métis goals, its value is limited. With the proclamation of the *Constitution Act, 1982*, there are better constitutional mechanisms available to Métis people to protect and foster their continuing identity as an Aboriginal people. Recent Canadian case law interpreting section 35 of the *Constitution Act, 1982*, is then examined to determine how this might assist Métis communities in protecting their distinctive identity.

Since the fundamental thesis of this paper is that there are in Canada a variety of self-defining Métis communities, there must also be a variety of methods by which their collective aspirations can be furthered. The paper considers several such methods. The first is the role of litigation in establishing Métis rights. The case of *Dumont v. A.G. Canada and A.G. Manitoba*, a legal action launched by the

Manitoba Métis Association concerning the land rights of the Red River Métis community and their descendants, is discussed as offering a way in which Métis communities might use the courts to advance their interests. The paper concludes that although this may be a powerful tool for some Métis communities, is unlikely to be effective for all.

Comprehensive land claims agreements are considered next. They offer significant advantages for Métis beneficiaries, but, like the litigation approach, this is not a means which can be used successfully by most Métis communities in Canada.

Next the attempt at comprehensive recognition of Aboriginal self-government contained in the Charlottetown Accord next receives extended consideration. Although the constitutional agreement failed to find support among the Canadian people, it provided a model for dealing with many of the problems of identification of the Métis community and determining how the constitutional entitlements of that community should be recognized. This paper suggests that even though the proposals contained in the Accord failed to become part of the Canadian Constitution they contain a number of helpful suggestions for proceeding with the delineation of Métis constitutional rights.

The paper concludes with a consideration of the possibilities that exist for the formal recognition and protection of Métis rights following the defeat of the Charlottetown Accord. Various options for enabling recognition of such rights are discussed, and the Alberta Metis settlements legislation of 1990 is considered as one example of a self-government scheme not dependent on comprehensive constitutional changes. Finally, the paper proposes a model statutory framework within which the Parliament of Canada might provide recognition of the right of Métis communities to self-government and as well provide a framework for conveying resources to these communities so that self-government might become a reality.

THE MÉTIS AND 91(24): IS INCLUSION THE ISSUE?

BY DON McMAHON AND FRED MARTIN

INTRODUCTORY NOTE

We should make clear from the start that neither of the writers is Métis. We are practitioners of Canadian law with some experience in that law as it relates to Aboriginal peoples. Our views have no doubt been influenced by the years we have spent working with the people of the Métis settlements of Alberta. Their struggle to secure, protect, and govern a land base has provided ideas, approaches, and principles that may be useful to Métis in other parts of Canada as they wrestle with similar issues. That said, it is clear that other groups of Métis will need to adopt different models to meet their different purposes. Consequently any new structure to recognize Métis self-government aspirations must articulate a few basic principles and then be flexible in implementation. That was the essence of the Charlottetown Accord.¹ We consider it a good starting point for future discussions.

We should also make clear that the views in this paper are ours and ours alone. We are not speaking for any other group of people. We do not know to what extent, if any, they are shared by the Métis Nation of Canada, the Native Council of Canada, the Metis Settlements of Alberta, or any other organization. What we have tried to do is review the legal and historical literature and draw on our own experience. It is not intended as a legal brief or a thesis. It is our view of the current state of Canadian law, whether we approve of it or not.

In preparing this paper we have made a number of assumptions. We believe a good case can be made that the Métis are one of the founding nations of Canada. We also believe many Métis in Canada

value, and wish to preserve and enhance, their existence as a people. This paper was prepared in the hope that it will contribute to creating a framework in which that wish can be realized. That framework will require the use of many tools — educational, political, social, legal, and others. Our focus is limited to the tools provided by the laws² of Canada. In this paper we try to identify the most obvious such tools and to evaluate how useful each may be in constructing the new framework. The initial focus is on 91(24) status — the legal recognition of Métis as Indians for the purposes of section 91(24) of the *Constitution Act, 1867*.³

Our conclusion is that it would be a long, costly, and uncertain process to rely primarily on 91(24) to build a suitable framework. Although it may have some value, it would be dangerous to rely solely on that tool to accomplish the multitude of tasks at hand. Having come to that conclusion we look to see what else is available. There are a variety of other models, from litigation based on principles derived from the decisions of Canadian courts concerning Indian cases, comprehensive land claims agreements, legislative approaches used in Alberta, and the Charlottetown Accord process. We consider some of these models as a source of ideas and principles for a future framework. We then look at one possible model for a framework. We hope an analysis of that model will further the discussion of what principles should underlie a future framework, what realistic frameworks are possible based on those principles, and what tools of law and policy are needed to make them a reality.

The framework we consider is based on Canada recognizing that Métis people have the capacity to define, create, and empower their own institutions. By translating that recognition into a framework in Canadian law, the rules or laws of those institutions become recognized and enforceable on the same footing as other laws of Canada. In many

ways this allows a statute of Parliament to accomplish what the Charlottetown constitutional process could not. The constitutional elevation of this statute could come later when these issues once again become part of the national agenda.

PART 1 — THE QUEST FOR CLEAR JURISDICTION

The Focus on 91(24)

For years governments, academics and Aboriginal leaders, have struggled with the question, are the Métis⁴ federal jurisdiction? To be more precise, are Métis included in the term ‘Indians’ in class 24 of section 91 of the *Constitution Act, 1867*?

In some circles the answer to this 91(24) inclusion question has become a Holy Grail. Over a year ago we set out on our quest hoping to review academic, judicial, and political views on the question. We hoped to report on how finding the Grail would affect federal and provincial government jurisdiction and responsibility with respect to the Métis. We also hoped to identify significant remaining questions and essential research.

After a year reviewing the literature, and considering the discussions leading to the ill-fated Charlottetown Accord, we have abandoned our quest. We are not sure the question is appropriate or the answer possible.

In our view, the jurisdictional question, can Parliament alone make laws about Métis and lands reserved for them?, cannot be answered without also asking, what do you mean by ‘Métis’? There are many possible answers. In the past the term has referred to many groups, including descendants of the Red River Métis community; mixed bloods, with a specified minimum Indian blood content; a defined base group plus those they accept; a self-defining group with some

objective and some subjective criteria; and other mixed-blood groups with some Aboriginal ancestry. The definitions have been as varied as the context, with only one common element — some Aboriginal ancestry.

It may not be possible to provide a general answer to the question, what do you mean by ‘Métis’? Existing answers have usually been given in the context of a specific purpose. For example, the *Metis Settlements Act* of Alberta provides one statutory definition⁵ of Métis for the purpose of establishing eligibility for membership in a Métis settlement in Alberta. Regulations under the federal *Fisheries Act* contain a different and anachronistic definition⁶ based on blood quantum for the purpose of establishing eligibility for certain fishing rights. The Métis Nation Accord, proposed in conjunction with the Charlottetown package, contained a third definition as a start for defining membership in the Métis Nation for purposes of that accord. Métis under any one, or none, of these three may be included in the meaning of “Métis peoples” in section 35 of the *Constitution Act, 1982*. The Constitution uses the term but does not define it.

The Limited Effects of 91(24) Inclusion

Insisting on a general definition outside of a particular context has in the past led to confusion and frustration. No one definition seems to fit all purposes. The failure to agree on a definition may provide an excuse for failing to address the basic needs of individuals, or communities, that are considered ‘Métis’ by themselves and their neighbours.

Since a general definition of Métis is so difficult, is it really necessary? Maybe not. Métis leaders looking for solutions to problems faced by their people have for years called on both federal and provincial governments for recognition and assistance. The response has

been uneven and uncertain — a lack of jurisdiction often being given as the reason for inaction. Too often what is really lacking is commitment, not jurisdiction. For example, a commitment in Alberta led to legislation regarding the Métis even though the province's jurisdiction was uncertain. With similar commitment other provinces could do the same. In short, although answering the 91(24) inclusion question may remove an excuse for inaction, it will not necessarily produce action.

While clarifying jurisdiction would make it easier to say who should act, it will not necessarily broaden the base of legal rights supporting Métis demands for action. It is very difficult to say what additional rights will accrue to a Métis person or community as a result of including Métis with Indians in the class of matters under exclusive federal jurisdiction. Certainly such a clarification will not change any existing Aboriginal rights now recognized in section 35 of the *Constitution Act, 1982*. It is also questionable whether confirming Métis inclusion in 91(24), without more, would imply federal statutory obligations to Métis similar to those owed to Indians under the *Indian Act*. Certainly those obligations have not been assumed equally for the Inuit and non-status Indians who are also included in class 24.

Federal jurisdiction also would not change any existing Métis Aboriginal or treaty rights under section 35, although it might encourage land claims agreements setting out such rights. In that context, however, issues of jurisdiction, duties, and rights will be resolved by participating Métis and governments and not as a necessary result of federal jurisdiction. In other words, as Métis address the question of what they need to survive as a people, federal jurisdiction may be an ill-defined tool of limited utility.

More is Needed Than Just 91(24) Inclusion

Like any other nation, the survival of the Métis as a people requires appropriate psychical and physical frameworks. The psychical framework is external and internal — external in that it demands recognition as a people, internal in that it builds on pride, confidence, and commitment. The physical framework is built on the cornerstones of land, power, and money. Jurisdiction, duties, and rights for Métis are relevant to the extent that they help answer the question, what legal tools are available to help us acquire recognition as a people and the necessary land, power, and money to survive as such? Usually the question is not put that bluntly, but it underlies land claims, self-government initiatives, economic development efforts, and social program access. Clarifying jurisdiction, duties, and rights for Métis — what we will, for simplicity, call the framework issues — helps identify the legal tools available. What the law cannot provide can then be sought by other means.

The Charlottetown Accord provided a means of addressing the fundamental survival issues facing Métis. Without it, the difficulty in providing a general answer to the question of whether Métis are 91(24) Indians may outweigh any benefit resulting from the answer. In our view a more useful exercise is to address the underlying issues that the Charlottetown Accord sought to help resolve. From that perspective we see the question as, what tools in Canadian law can be used to build a framework of jurisdiction, duties, and rights for Métis?

With that question in mind, the purpose of this paper is to review political, academic, and judicial comments related to jurisdiction; consider how the jurisdiction question affects the defining of duties and rights for Métis; and identify some approaches that could help clarify these framework issues for Métis.

PART 2 — THE LIMITATIONS OF EXISTING LEGAL TOOLS

Jurisdiction, Duties, and Rights in Current Law

Sources of law

It is reasonable to assume that, in spite of the failure of the Charlottetown Accord, the Métis will continue their efforts to build new frameworks for self-determination and economic well-being. The legal tools for that effort can be found in four places:

- **The Constitution**

Pre-1982 — federal jurisdiction via 91(24) — any rights that may arise as a result of including Métis in the term ‘Indians’ as used in the 91(24) class of matters exclusively within the jurisdiction of the Parliament of Canada

Post-1982 — section 35 of the *Constitution Act, 1982*⁷

recognizes existing Aboriginal and treaty rights, the latter including rights recognized in land claims agreements

- **Common Law** — common law Aboriginal rights recognized in case law
- **Legislation** — federal or provincial statutes and regulations, such as the *Indian Act* or the Métis settlements legislation in Alberta
- **Agreements** — land claims and otherwise between Métis groups and governments

The problem for the Métis is that, with the exception of the Métis legislation in Alberta, the current law from these sources is unclear and uncertain.

Before the *Constitution Act, 1982* was adopted the legal situation for Métis people was even more uncertain. Virtually nothing in law recognized a distinctive status for Métis as an Aboriginal community. Métis tried to have the federal government accept jurisdiction under the

provisions of section 91(24) of the *Constitution Act, 1867* in order to gain such recognition. Prior to the 1982 amendment to the Canadian Constitution, this was seen by many as the only way in which Métis communities could obtain distinctive entitlements deriving from their status as Aboriginal people.

Unfortunately, the historical evidence used to maintain this position was susceptible to differing interpretations, and the issue was never determined decisively. With the adoption of the *Constitution Act, 1982*, however, a new basis for the legal recognition of the Métis people as an Aboriginal people was established. This was provided in section 35.

The 1982 constitution gave recognition without definition

Section 35 of the *Constitution Act, 1982* states:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

5(2) In this *Act*, “aboriginal peoples of Canada” includes the Indian, Inuit, and Métis peoples of Canada.

In the 10 years since its enactment, a number of attempts have been made, through the vehicle of first ministers conferences and other constitutional amending processes, to give further particularity to this provision of the *Constitution Act, 1982*. The clause has also been the subject of much scholarly commentary and some judicial decision, most notably *R. v. Sparrow*.⁸

This attention to section 35 has resulted in some clarification of what the provisions of the section entail, but much uncertainty regarding the scope, content, and meaning of the section remains. This is especially true with regard to the Métis people.

Charlottetown sought to address the need for definition

For the decade following the adoption of the *Constitution Act, 1982*, and until the amendment process that resulted in the Charlottetown Accord, these uncertainties were fundamental. Who were the Métis people recognized by the new Constitution? What were their “existing aboriginal and treaty rights”? How were such rights to find constitutional expression? What jurisdiction of Canadian government had ultimate responsibility for fulfilling such rights and protecting the constitutionally recognized interests of Métis people? This last question in turn raised another long-standing issue. Which groups of people, given constitutional recognition as Aboriginal peoples in Canada, were entitled to be considered ‘Indians’ for purposes of section 91(24) of the *Constitution Act, 1867* and thus within the exclusive legislative authority of the Parliament of Canada?

In 1992 the Charlottetown Accord proposed answers to some of these questions — or established a process that might have done so. With the failure of the accord, these questions continue to await some definitive answer. The means now available for providing such answers is the topic explored in this paper.

The Problem of Defining Métis

Métis roots in Manitoba's Red River

Of the three groups of Aboriginal people identified in section 35 of the *Constitution Act, 1982*, the Métis have the least determinate identity. The word has been given a variety of historical and contemporary political uses, and it is far from self-evident which of these uses was intended by the framers of the *Constitution Act, 1982*.

The origin of the word Métis is French and simply means ‘mixed’. In the Canadian context, the word came to be applied to the French- and Cree-speaking descendants of European men and Indian women who had, by the mid-nineteenth century, established mixed-race communities in the Red River basin south of Lake Winnipeg. In contrast, the term ‘half-breed’ was applied to members of those Red River communities that had similar origins to those of the French- and Cree-speakers, but who were English-speaking and pursued a more agrarian lifestyle. Unlike their French- and Cree-speaking counterparts, these ‘half-breeds’ were largely Protestant in religion.⁹

Political developments at Red River in the late nineteenth century gradually led to a terminological fusion regarding references to members of both of these mixed-race communities. The transfer of Rupert’s Land to Canada, the political organization of some of the mixed-race people under the leadership of Louis Riel, the passage of the *Manitoba Act*¹⁰ and the creation of the province of Manitoba led to the more general characterization of all mixed-race inhabitants of the Red River Valley as Métis.¹¹

The Manitoba Act recognized Métis

All such inhabitants, regardless of linguistic or religious identity, were granted entitlements under the land allocation provisions of the *Manitoba Act, 1870*. This statute provided that ungranted lands, to the extent of some 1.4 million acres, were to be set aside “...for the benefit of the families of the half-breed residents”. The *Manitoba Act* stated further that the basis for such allocation was that it was “expedient, towards the extinguishment of the Indian title to the lands of the Province,” to provide this entitlement to the half-breed residents.¹²

Potential beneficiaries of the land settlement scheme established under the *Manitoba Act*, or their descendants, established themselves in a number of other locations across the northern prairie in the 1870s and '80s. There, under the provisions of various enactments of the *Dominion Lands Act*,¹³ these individuals became eligible for allocation of half-breed land or money scrip, through which they could obtain land under a scheme similar to that established by the *Manitoba Act, 1870*. As well, the legal basis under which such land allocations were made was similar to that underlying the *Manitoba Act*. Section 125 of the *Dominion Lands Act, 1879*, stated:

To satisfy any claims existing in connection with the extinguishment of Indian title preferred by half-breeds resident in the Northwest Territories, outside the limits of Manitoba, on the 15th day of July one thousand eight hundred and seventy, by granting land to such persons, to such extent and on such terms and conditions as may be expedient.¹⁴

The eligibility for such allotments provides a basis for one definition of Métis. As one legal commentator has stated,

If there is a legal definition of Métis, it means the people who took half-breed grants under the *Manitoba Act* or the *Dominion Lands Act* and their descendants. Section 12(1)(a)(i) of the *Indian Act* excludes these people from registration as Indians.¹⁵

This is a useful definition that can be made slightly more accurate by rephrasing it to state that

the Métis are the descendants of the people who were *entitled* to half-breed grants under the *Manitoba Act* or related legislation.¹⁶ [emphasis in original]

Although the mixed-race population of the pre-Confederation Red River communities and their descendants provides one group that may be clearly designated as Métis, many other groups, at one time or another, have also been so characterized. Such groups may have little or no direct relationship to the Red River community; they may share with that community only a mixed European-Aboriginal origin.

Other people are also considered Métis

A number of mixed-blood communities have been identified throughout what has become Canada. A striking example can be found in the issuance of half-breed scrip under successive *Dominion Lands Acts*. Such issuance was not confined solely to the descendants of members of the Red River community. As the treaty-making process continued across the western prairie and in the North, people of at least some Aboriginal ancestry, who appeared to be leading an Aboriginal lifestyle but had not entered treaty, were allotted half-breed scrip to extinguish whatever pre-existing Aboriginal interest they might have had in the lands in question. Further, in a number of instances, individuals who initially entered treaty subsequently became enfranchised and received allocations of half-breed scrip.¹⁷

In other parts of Canada, there were communities of mixed European-Aboriginal ancestry that had no connection whatsoever with the historical Red River community. For example, in the Acadian region and in Quebec, there were identifiable groups sharing French-Indian heritage.¹⁸

In both southern and northern Ontario, communities had emerged by the middle of the nineteenth century that had European-Indian heritage. Members of such communities sought either the issuance of scrip on the model employed in western Canada or equal treatment with Indians by way of the taking of treaty and the creation of reserves.¹⁹

Across northern Quebec and Ontario, northeastern Manitoba and the western part of the Northwest Territories, communities of European-Indian origin initially connected with the Hudson's Bay Company came into existence and developed distinctive identities.²⁰ Members of such communities in the Northwest Territories received half-breed scrip during the making of Treaties 8 and 11 and are parties

to ratified or proposed comprehensive land claim settlements in the western Arctic today.

In addition to all of these groups there are a number of other communities of mixed European-Aboriginal ancestry in Canada whose members might also qualify as Métis. These include those Inuit-European-Indian descendants living in Labrador²¹ and Indian-European descendants living in the Grand Cache area of Alberta.²²

There are at least two legislated definitions

There are currently at least two different legislated definitions of Métis, one made by the legislature of Alberta and one by the Parliament of Canada. In Alberta, the term Metis has for more than 50 years been defined in the statute providing for a system of Métis settlements in the northern part of the province. These settlements were established in the late 1930s in response to the desperate economic situation in which communities of mixed European-Aboriginal ancestry found themselves during that time. The definition of Métis employed in the original *Metis Betterment Act*, under which the Métis “colonies” (later “settlements”) were established, stated:

“Metis” means a person of mixed white and Indian blood having not less than 1/4 Indian blood, but does not include either an Indian or a non-treaty Indian as defined in the *Indian Act*.²³

The *Metis Betterment Act* was repealed and replaced in 1990 by the *Metis Settlement Act*. In this statute, Métis simply defined as

a person of aboriginal ancestry who identifies with Metis history and culture.²⁴

A regulation under the federal *Fisheries Act* still includes a definition almost identical to the definition in the old *Metis Betterment Act*:

“Métis” means a person of mixed white and Indian blood having not less than one quarter Indian blood but does not include an Indian.²⁵

The individuals included under this definition did enjoy an Aboriginal entitlement; they were given essentially the same rights concerning the taking of fish for food as were treaty Indians in at least some parts of western Canada.

National Aboriginal groups have given varying definitions

The establishment of Aboriginal political organizations in the 1970s lent further complexity to definitions of Métis. The Native Council of Canada was founded as a national organization with a stated purpose of representing Métis and non-status Indians. This latter group consisted of individuals who, although potentially eligible for registration as Indians under the provisions of the *Indian Act*, had either never been registered or had been deprived of their status as Indians under the *Indian Act* for a variety of reasons, often having to do with the marriage provisions of the *Act*.²⁶

In 1983, a split developed within the Native Council of Canada, and the Métis National Council, based in western Canada, was established. In a pamphlet entitled the “The Métis — A Western Canadian Phenomenon” the newly established Métis National Council outlined the following criteria for determining who were Métis. The pamphlet stated:

- 1) The Métis are:
 - an aboriginal people distinct from Indian and Inuit;
 - descendants of the historic Métis who evolved in what is now western Canada as a people with a common political will;
 - descendants of those aboriginal peoples who have been absorbed by the historic Métis.

- 2) The Métis community comprises members of the above who share a common cultural identity and political will.²⁷

The Native Council of Canada continued to maintain that it represented a national constituency of Métis and other people of Aboriginal ancestry. The perspective of the Native Council of Canada on the definition of Métis was articulated in a pamphlet published by the New Brunswick Association of Métis and Non-Status Indians in 1984. As stated there,

The Métis people are generally defined as persons of Indian and non-Indian ancestry. Some limit the definition of Métis to the historical Métis of the Prairie Provinces. It was in the Red River settlement that the Métis developed a sense of nationalism. In 1869, under the leadership of Louis Riel, they formed a provisional government which negotiated Manitoba's entry into Confederation. However, Métis exist in all parts of Canada. In Ontario, there were half-breed reserves. In Quebec, the Métis are accepted by neither status Indian communities, nor the French communities, although they are called 'Sauvages'. In New Brunswick, the census returns of 1901 enumerated Métis as a distinct group from Indians and whites....

There is no one exclusive Métis people in Canada any more than there is any one exclusive Indian people in Canada. The Métis of eastern Canada and northern Canada are as distinct from the Red River Métis as any two peoples can be. Yet all are distinct from Indian communities by ancestry, by choice, and their self-identification as Métis. As early as 1650, a distinct Métis community developed in Le Heve, Nova Scotia, separate from Acadian and Micmac Indians. All Métis are aboriginal people, all have Indian ancestry, and all want options.²⁸

Difficulties with the definition of Aboriginal communities in Canada are not unique to the Métis. The Indian community, and the Inuit, are also subject to them. In many ways, however, Métis people are in a distinctive situation. There is a wide variety of self-identifying mixed-race communities throughout the country, with diverse historical origins and contemporary identities. The same is true of the Indian

community, but with regard to that community there have been legal definitions, widely used in practice, that have provided a set of standards against which a wide variety of groups can be measured. To date, this has not been so true with regard to the Métis people of Canada.

The Meaning of 'Indian' in 91(24)

The context for defining 91(24)

If the question is, are the Métis included in 91(24)?, an answer is clearly made more difficult if there are problems defining what we mean by Métis. To complicate matters, section 91(24) of the *Constitution Act, 1867*, while giving the Parliament of Canada exclusive legislative authority for “Indians, and Lands reserved for the Indians”, does not state clearly which Aboriginal people are to be considered Indians for purposes of this section. The resulting uncertainty has produced much scholarly commentary and a need for judicial clarification. We will consider the comments and case law briefly.

The Indian Act complicates matters

Parliament has chosen to exercise its 91(24) jurisdiction in relation to some groups of ‘Indians’ extensively over the years, beginning in 1868 with the passage of *An Act Providing for the Organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands*.²⁹ This enactment has been succeeded by a series of statutes asserting federal jurisdiction over many aspects of both the collective and individual activities of people defined in the legislation as Indian. The *Indian Act*³⁰ currently in force states that an Indian means

a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.³¹

Section 6 of the current Act provides a detailed itemization of the requirements that must be met in order to establish eligibility for registration as an Indian under the Act. It should be noted, however, that registration as an Indian is not synonymous with inclusion on a band list and consequent membership in an Indian band. The requirements that must be met in order to obtain such membership are specified in sections 8 through 13 of the current *Indian Act*.

This is a significant qualification in many respects, not the least of which is that the right to reside upon an Indian reserve is legally dependant upon membership in the band for whose use and benefit the reserve has been established. Such residency has considerable practical significance for the actual exercise of effective federal power concerning Indians, since the government of Canada has chosen to exercise the full range of its jurisdiction for Indians only in relation to Indian reserve lands and those resident upon them. Those people registered as Indians who live off-reserve are entitled to some federal government programs designed for registered Indians, but are generally subject to the jurisdiction of the province within which they reside.

The status categories that have been established in successive Indian Acts have greatly complicated the process of legally defining the various Aboriginal peoples of Canada. As noted, there are significant numbers of people throughout Canada who are descendants of registered Indians but who have either lost their status through the operation of some provision of the *Indian Act*, or who, although entitled to be registered, have never been registered as Indians. Such people are characterized as 'non-status Indians' and have political representation through Aboriginal organizations such as the Native Council of Canada, which also represents self-identifying Métis communities located in

some parts of the country. Since these non-status Indians fall outside the federal statutory registration scheme for Indians, and since they are not eligible for residency on reserves, the Parliament of Canada chooses to exercise little or no responsibility for them.

However, the term ‘Indians’ in section 91(24) of the *Constitution Act, 1867* is not simply coterminous with the statutory definition of Indian provided by Parliament in the *Indian Act*. This was determined conclusively by a 1939 judgement of the Supreme Court of Canada in a reference case, *Re: Eskimos*.³²

Re: Eskimos extended the 91(24) definition to include Inuit

More than 50 years ago the question of the scope of 91(24) came before the courts in *Re: Eskimos*. A dispute had developed between the governments of Canada and Quebec over jurisdiction and responsibility for the Inuit population of northern Quebec. Acting under the authority given by section 55 (now section 53) of the *Supreme Court Act*,³³ the governor general in council made a reference to the Supreme Court of Canada directing it to respond to the question:

Does the term “Indians” as used in head 24 of s.91 of the *British North America Act, 1867* [now the *Constitution Act, 1867*] include Eskimo inhabitants of the Province of Quebec?³⁴

There were three judgements by the Court. All concurred in the result that the Inuit inhabitants of Quebec, and by implication in all other parts of Canada, were indeed ‘Indians’ for purposes of section 91(24) of the *British North America Act, 1867*.³⁵ This conclusion meant that jurisdiction over matters relating to Inuit properly belonged to the Parliament of Canada.

In reaching this result, each judgement used a method of inquiry that was essentially historical. In the judgement of Chief Justice Duff

and Justices Davis and Hudson (Crockett J. concurring) the Chief Justice characterized the approach used in this way:

The *British North America Act* is a statute dealing with British North America and, in determining the meaning of the words “Indians” in the statute we have to consider the meaning of that term as applied to the inhabitants of British North America.³⁶

To do this, the author of each decision examined a variety of historical materials from the period, such as parliamentary reports, official proclamations, missionary reports, and the correspondence of public officials. Special attention was given to the 1857 Report of the Select Committee of the United Kingdom House of Commons on the Hudson’s Bay Company. The Committee had been struck in 1856 to investigate the affairs of the Company, which at the time exercised governmental authority in what was to become northern and western Canada.

The assessment of all these materials led each of the three judges writing decisions to the conclusion that the word Indian as used at the time of Confederation was also used to designate Inuit. The three judges drew some further implications from this as well. As Chief Justice Duff stated:

it appears that, through all the territories of British North America in which there were Eskimo, the term ‘Indian’ was employed by well-established usage as including these, *as well as the other aborigines*, and I repeat the *British North America Act* insofar as it deals with the subject of Indians, must, in my opinion, must be taken to contemplate the Indians in British North America as a whole.³⁷ [emphasis added]

After extensive consideration of the text of the Resolutions of the Quebec Conference of 1864, Canon J. (Crockett J. concurring) stated:

This I think disposes of the very able argument on behalf of the Dominion that the word ‘Indians’ in the *British North America Act* must be taken in a restricted sense. The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen understood that the English word “Indians” was equivalent to or

equated with the French word “Savages” and *included all the present and future aborigines native subjects of the proposed Confederation of British North America ...*³⁸ [emphasis added]

Finally, Kirwin J. stated, in a judgement concurred in by Cannon and Crockett JJ.:

In my opinion, when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with “*Indians and Lands reserved for the Indians*”, *the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation.*³⁹ [emphasis added]

The court did not venture beyond these words and indicate exactly who these other “aborigines” might be. Nor was the inclusion of Métis people within this term considered. Subsequent to the *Re: Eskimos* decision, however, attention would turn to this issue.

There is no agreement on 91(24) inclusion among scholars or politicians

One of the earliest pieces of academic commentary on this matter was an article in 1979 by Clem Chartier.⁴⁰ Following the practice established by the Supreme Court of Canada in *Re: Eskimos*, Chartier examined historical materials from the late eighteenth century and the nineteenth century to determine which groups of people were characterized as Indians by contemporary observers.

As did the Supreme Court, Chartier placed considerable emphasis in his analysis on the 1857 Report of the Select Committee of the United Kingdom House of Commons on the Hudson’s Bay Company. His conclusion was that the witnesses who appeared before that committee, and the materials it examined, tended to identify Indians and ‘half-breeds’ as constituting an Aboriginal population and thus both would be considered, like the Inuit, ‘Indians’ in the parlance of the period.

Chartier also considered statutory and other official materials from the British North American colonies roughly contemporary with the *Constitution Act, 1867*. His reading of this evidence was similar to his interpretation of the 1857 Select Committee materials. There was, in Chartier's view, a general tendency to characterize all people of any Aboriginal ancestry as Indians, although other terms might also be used to designate 'half-breeds' more specifically. As a result, Chartier concluded that for purposes of the *Constitution Act, 1867*, 'half-breeds' had to be considered Indians and thus, like Inuit, to be covered by the provisions of section 91(24) of the *Constitution Act, 1867*.

Some other scholars, examining the same historical materials assessed by Chartier, have reached different conclusions. Bryan Schwartz in *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada*⁴¹ also analyzed the 1857 Report of the Select Committee of the United Kingdom House of Commons relied upon by both the Supreme Court in the *Re: Eskimos* decision and by Chartier. Schwartz drew the conclusion that the evidence in the report showed that 'half-breeds' (unlike Inuit) were not comprehended in general contemporary usage of the word Indian.⁴²

Unlike Chartier, however, Schwartz drew distinctions between various categories of mixed-race or 'half-breed' peoples in his discussion of the subject. For example, the 'half-breeds' referred to in the 1857 report were members of the Red River community. Schwartz's reading of the historical materials was that such peoples were not included in the category Indians as that term was generally used in the mid-nineteenth century. As a result, following the method employed by the Supreme Court of Canada, Schwartz concluded that such people, and their descendants, to whom alone he applied the term 'Métis', could not

be regarded as Indians for purposes of section 91(24) of the *Constitution Act, 1867*.

In addition to the Red River Métis, Schwartz went on to consider the situation of other mixed race groups, whom he described as “people, usually of mixed ancestry, who continued to closely associate with traditional Indian groups”. With regard to these people, Schwartz concluded that “historical legal practice supports their inclusion within section 91(24).”⁴³

Schwartz’s subsequent discussion of the Métis and section 91(24) does not really consider the people whom he placed in this category of section 91(24) Indians. Perhaps Schwartz felt that eventually most people who constituted this category were absorbed through the registration system established by the Parliament of Canada in various Indian Acts for people therein defined as Indians. Whatever the case, for Schwartz such people were not Métis. Like the Métis National Council, Schwartz confined that term to members of the historical Red River community, their descendants, and people who had subsequently adhered to that community throughout western Canada. These people, he concluded, were not regarded as Indians in the mid-nineteenth century and therefore could not be regarded as included within section 91(24) either in 1867 or today.

An even more emphatically negative position toward consideration of Métis as section 91(24) Indians, or even as an Aboriginal people, has been expressed by Thomas Flanagan. In a number of scholarly pieces,⁴⁴ Flanagan has argued that the members of the Red River community, to whom alone of all mixed-race people he ascribes the term Métis, cannot be considered Aboriginal people at all. Analyzing the historical development and the mixed-race origins of the Red River Métis community against Canadian judicial decisions setting out the criteria that must be met before a group of people can be

acknowledged to possess an Aboriginal title to land, Flanagan has argued that the Red River Métis cannot successfully establish that they possess such title. The essence of his position was well summarized when he stated:

There were some mixed blood people who had Indian wives, lived with Indian bands, and were scarcely distinguishable from Indians. But they could be, and usually were, allowed to adhere to treaty as part of the bands with whom they lived. To the extent that the Métis led a truly aboriginal life, they were not distinct from the Indians; and to the extent that they were distinct from Indians, their way of life was not aboriginal.⁴⁵

The mere fact that the federal government acknowledged through statutory recognition that the Red River Métis had some type of interest in the lands they had traditionally occupied could not provide a basis for the ongoing recognition of full-fledged Aboriginal status for the descendants of that community. The same right was given to long-time white inhabitants of the Red River valley who made no pretence of being Aboriginal people.⁴⁶

The courts have given no clear direction on 91(24) inclusion

The debate on whether some Métis are included in the term Indians in section 91(24) and the jurisdictional implications of such inclusion has not been limited to scholars. The courts have been compelled to address this issue on occasion and to apply the reasoning adopted in *Re: Eskimos* to the particular facts before them.

As in the scholarly forum, conclusions have been mixed. In some cases, such as *R v. Rocher*,⁴⁷ the court was at the very least sympathetically disposed to the position taken by Chartier and was prepared to consider the possibility that Métis might be considered Indians for purposes of section 91(24). Other decisions, such as *R. v.*

Genereaux,⁴⁸ reached the opposite result, often after evaluating the same historical materials that had led Chartier to his conclusions.

More recently, some Alberta courts have held that an individual who was a descendant of scrip takers but who followed an Indian way of life should be considered an Indian within the meaning of section 12 of the Natural Resources Transfer Agreement⁴⁹ and might thus avail himself of all of the hunting, fishing, and trapping rights guaranteed to Indian people under that section of the Agreement.⁵⁰ These decisions did not consider whether the inclusion of such people within the terms of the Transfer Agreement might generally extend to considering them Indians for purposes of section 91(24).

The views of political bodies differ

The controversy regarding which level of government had constitutional responsibility for Métis peoples was not confined to academic debate or to the courts. The federal government long maintained that it had no jurisdiction to legislate for Métis peoples. In the view of successive federal government representatives, even the recognition of the Métis people as an Aboriginal people in section 35 of the *Constitution Act, 1982* had no readily apparent jurisdictional implications.⁵¹ This position did ultimately change in 1992, when the government of Canada agreed, in the Charlottetown Accord, that, for purposes of section 91(24) of the *Constitution Act, 1867*, all groups identified as Aboriginal peoples in section 35(2) of the *Constitution Act, 1982* should be considered 'Indians'.

The provinces, with the exception of the province of Alberta, have generally held that responsibility for Métis peoples was a federal responsibility and that the Métis were included within the provisions of section 91(24) of the *Constitution Act, 1867*. Such unresolved

jurisdictional wrangling meant that the legal entitlements of Métis as Aboriginal people tended to receive little concrete attention, since both levels of government maintained that this was not within their area of responsibility. Although the Charlottetown Accord did offer a way out of this impasse, what impact on future events this agreement will have remains to be seen.

The Native Council of Canada and the Métis National Council have both maintained that, like the Inuit, the Métis should be considered as included in class 91(24) and consequently within the jurisdiction of Parliament. The justification offered for this was essentially that proposed by Chartier: the Métis were an Indigenous people, and the term Indians in section 91(24) should be interpreted as applying to all Indigenous peoples in Canada. Representatives of both organizations pressed throughout the 1970s and '80s to have explicit constitutional recognition given to this interpretation.⁵²

The Métis settlements of Alberta have been less clear-cut on this issue. During the constitutional debate of 1982 a paper by the Alberta Federation of Metis Settlement Associations, "Metisism: A Canadian Identity", stated:

Perhaps the most compelling reason for us opting out of an exclusive relationship with the federal government is that, while it might enhance our political status, it does not fit with the Métis way of doing things. More than any other Canadians, we recognize the importance of western provincial rights: our ancestors formed two provisional governments to defend them. We are proud to be western Canadians and proud to be Albertans.⁵³

The paper went on to state the settlements' position that

we are prepared to accept provincial jurisdiction over the Metis Settlements except in matters relating to our aboriginal rights.⁵⁴

The accord between the settlements and the province that provided for provincial jurisdiction so long as it did not affect Aboriginal rights was consistent with this position.

The Role of 91(24) in the Future

In 1982 a new constitution provided a new foundation

As indicated by the range of opinion outlined above, the analysis of historical materials roughly contemporary with the *Constitution Act, 1867* may lead to very different conclusions about the meaning and jurisdictional reach of the term Indian in 91(24). Such an approach has not, and probably cannot be, conclusive given the ambiguities in the evidence. Even if the ambiguities could be removed, it is not clear the result would resolve issues arising in different historical circumstances and contexts. Might there not be a better way to address and resolve these issues? We think so, and it has been provided by the scope of the provisions of section 35 of the *Constitution Act, 1982*.

Section 35 of the *Constitution Act, 1982* not only recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada but also defined Aboriginal peoples as including the Indian, Inuit and Métis peoples.

This acknowledgement of rights and of the constituent groups that are the beneficiaries of such rights did not, however, include any further enumeration of who constituted the defined groups. Although Métis were acknowledged as Aboriginal people, it was not clear who were regarded as Métis or exactly which rights they might enjoy.

For all of these difficulties, however, the adoption of section 35 held out the potential to substantially advance recognition of the legal entitlements of Métis people as an Aboriginal community. The constitutional recognition that the Métis were an Aboriginal people

whose existing Aboriginal and treaty rights were recognized and affirmed made possible consideration of a new approach to clarifying both legal rights and jurisdictional issues.

Such an approach would not be based exclusively on the interpretation of ambiguous historical materials; it would be derived instead from an understanding of what purposes the Canadian constitutional order should be trying to realize with regard to Aboriginal peoples and their rights. Rather than trying to fit contemporary realities of Canadian public life within categories first developed in another era, such a ‘purposive’ interpretation of the provisions of section 35 would elucidate the public values by which Canadian governments should be guided in their relationships with Aboriginal communities. This approach is far removed from the scheme developed in *Re: Eskimos* and in the debates about jurisdiction and entitlements organized around the categories derived from that judgement.

Although Chartier’s article was written before the passage of the *Constitution Act, 1982*, he raised (but did not pursue) considerations that would be open to much greater elaboration under the approach suggested above. At the conclusion of his article, Chartier stated:

The writer suggests that a further argument, which has not been entered into, can be based on “aboriginal title”. This title is based upon a common law principle “... resulting from an unseverable imperial policy applying to all natives, of whatsoever description, that the imperial power comes into contact with; ...”. This aboriginal title gives the Indians, or Aborigines, a certain right to the lands they occupy. In passing the *B.N.A. Act, 1867*, the Imperial Parliament must have had in mind the protection of the land rights of all “aborigines”. Prior and subsequent dealings with the half-Indians or half-breeds portrays that their aboriginal title was recognized.⁵⁵

This theme was not developed by Chartier, but it suggested directions that might be pursued once a clear basis for recognizing Métis Aboriginal and treaty rights had been adopted.

Not all commentators on section 35 saw its provisions as significantly enhancing, at least in the short term, the legal recognition of a distinctive constitutional position for Métis people or of their Aboriginal rights. Both Bryan Schwartz and Thomas Flanagan had to consider what the inclusion of Métis as a constitutionally recognized group of Aboriginal people might mean. Both raised the issue and both concluded it potentially meant little or nothing. Each author defined Métis for his own purposes as being members of the Red River community and their descendants. Neither gave extensive consideration to the large number of other mixed-race communities in the country, except to say that where such people enjoyed an Indian lifestyle, or were associated with Indians, they should be (and probably had been) regarded as 'Indians'.

With regard to those whom they had defined as Métis, however, both authors expressed considerable doubt that the constitutional recognition of these people as Aboriginal people had, or (in the case of Flanagan) should have, any great immediate significance. Schwartz stated:

Section 35(2) of the *Constitution Act, 1982* says that the aboriginal peoples referred to in the *Constitution Act, 1982* include "Indian, Inuit, and Métis peoples of Canada". On its own, the section confers no rights of the Métis. It may turn out that the Métis have very few entitlements under the other sections of the *Act* which do speak to the rights of aboriginal peoples. Section 35(1) recognizes and affirms "the aboriginal and treaty rights" of the aboriginal peoples of Canada. It may be on April 17, 1982, the Métis had no aboriginal or treaty rights. In any event, the survival of the constitutionally protected Métis rights does not require parliamentary, as opposed to judicial authority. An expansive interpretation of section 91(24) is not justified by a necessity for Parliament to protect the newly assured rights of the Métis from local interference. The courts can do that. Nor is it legitimate to combine the judgment of Canon J. [in *Re: Eskimos*]—"Indians are all aborigines"—with

section 35(2)—“Métis are aboriginal peoples” in order to conclude that Métis are section 91(24) Indians.⁵⁶

For Flanagan:

...the best policy for the time being would be to emphasize the word “existing” in section 35(1) of the *Constitution Act, 1982*. If there is to be a major change in the status of the Métis as a corporate entity, there ought first to be full and informed public discussion culminating in parliamentary debate over such fundamental issues as who the Métis are and whether they are different from non-status Indians, why they are thought to have a share of aboriginal title, and why the historical mechanisms of extinguishment are now considered to have been ineffective. None of this discussion took place in the rapid series of political deals which led to the final wording of the constitutional amendments [made in the *Constitution Act, 1982*].⁵⁷

A purposive reading of section 35 may help define ‘Métis’

Other commentators disagree with these conclusions of Schwartz and Flanagan and have maintained that the adoption of section 35 offers at least the possibility of new-departures in the articulation of Métis rights. Most of the authors who have engaged in this enterprise have adopted what will be characterized, following William Pentney, as a “purposive” view of the provisions of section 35.

In an extended analysis of the Aboriginal rights provisions of the *Constitution Act, 1982*,⁵⁸ Pentney considered the definitions of Aboriginal peoples under the Canadian Constitution and the relationship between section 91(24) of the *Constitution Act, 1867* and section 35 of the *Constitution Act, 1982*. Pentney posited two different methods for determining which peoples were intended to be included within the provisions of subsection 35(2) of the *Constitution Act, 1982*.

One of these approaches was to identify such peoples as being included within the definition of Indian in section 91(24) of the *Constitution Act, 1982*;⁵⁹ the other would be to analyze the terms used

in section 35(2) “...sui generis, on the basis of the contemporary understanding of these terms and in light of the purpose of the constitutional guarantee.”⁶⁰

The first of Pentney’s methods for determining the identity of Aboriginal peoples was derived from the historical approach to the interpretation of section 91(24) that had been used by the Supreme Court in *Re: Eskimos* and by Chartier, Schwartz and Flanagan. After reviewing some of the historical evidence presented to sustain a claim that Métis might be considered section 91(24) Indians, Pentney concluded that it could

...reasonably be inferred that the Métis, or half-breeds who ordinarily resided with, and shared the lifestyle of, Indian bands, were contemplated [as “Indians”] when the Resolutions which preceded the enactment of the *Constitution Act, 1867* were drafted.⁶¹

On this interpretation, Métis who were the descendants of inhabitants of those communities that in 1867 resided with and shared a lifestyle with Indian bands could make a claim to be considered Indians under the terms of 91(24) and would constitute the Métis people whose Aboriginal and treaty rights were recognized and confirmed by section 35. The nature and content of such rights would have to be further defined, through either constitutional amendment or court actions; but whatever entitlements might exist, they were to be enjoyed only by those individuals who could prove descent from mixed-race people who would have been regarded as essentially indistinguishable from Indians by the authors of the *Constitution Act, 1867*.

The other approach suggested in Pentney’s analysis is to attempt to define the terms used in section 35 of the *Constitution Act, 1982* in light of our contemporary understanding of these terms and in the context of what the purposes of section 35 are interpreted to be in an ongoing way. In his discussion of how the term Métis might be

interpreted in this context, Pentney begins with existing definitions of the term in Canadian law.⁶² Many of these have been generated through efforts to define the mixed-race communities of Red River and their descendants. Pentney notes, however, that other such definitions exist as well and points to the *Alberta Metis Betterment Act* (now repealed and replaced by the *Metis Settlements Act* and related legislation) which, as noted above, defined Métis solely in terms of mixed Indian-European ancestry and made no reference to identification with the historical Red River community.

In Pentney's view, a purposive interpretation of section 35 must move beyond the purely historical approach adopted in *Re: Eskimos*. In determining who constitutes Métis (and other Aboriginal groups as well), he states:

...ancestry will no longer be the determinative factor. Here...a court should evaluate a person's claim to the entitlement to aboriginal rights as a Métis by referring to several factors, including ancestry, kinship, culture, community acceptance, lifestyle and self-identification.⁶³

A purposive approach has practical advantages

Adopting Pentney's type of interpretive perspective would eliminate the need to sift the ambiguities of the historical record to determine who, at a given point in time, might have been regarded by some set of privileged observers as 'Métis'. Instead, the focus would shift to contemporary expressions of community identification, bounded by a set of legally determinable criteria. These would be fixed by the courts, by constitutional negotiations or through other types of formal inter-jurisdictional agreements. As Pentney observes, one of these criteria should be that some Aboriginal ancestry would be required for group membership in all those communities that desired to make a claim for entitlements as Aboriginal peoples.⁶⁴

Other scholars have suggested more detailed sets of criteria as well, and some of these will be considered below. Pentney's contribution to the definitional debate was to suggest that historically derived criteria for the constitutional definition of Aboriginal peoples need not be relied upon to the exclusion of a broader range of considerations, which would give expression to the self-understanding of contemporary Aboriginal communities.

In addition to Pentney's work, there have been other scholarly efforts to consider a purposive definition of section 35. Catherine Bell has written extensively on this subject⁶⁵ and has suggested that the definition of Métis should not be considered closed based purely on historically determined criteria. She says,

Taking into consideration the minimal criteria set out in s.35, and the difficulty in identifying a single Métis people, the most logical solution to the definition debate is to define the "Métis" in s.35(2) as belonging to one of two possible groups.

- The descendants of the historic Métis Nation [i.e., the Red River community];
- People associated with ongoing Métis collectivities.

A refusal to select identifying criteria by freezing cultural idioms at a given point in history allows the interpreter of s.35(2) to define "Métis" for Constitutional purposes as small "m" Métis. This interpretation makes sense in the context of the political activity surrounding the negotiation of s.35, avoids unilateral application of a legal definition and allows for self-determination of membership.⁶⁶

Professor Bell has pointed out elsewhere that such a purposive reading of constitutional texts relating to Aboriginal people has some support even in relation to section 91(24) itself.⁶⁷ As was noted above, Canon J. in his judgement in *Re: Eskimos* indicated that in his view the term Indians as used in the *Constitution Act, 1867* included

All present *and future* Aborigines native subjects of the proposed Confederation of British North America.⁶⁸ [emphasis added]

Such a prospective definition of Indians, when combined with the purposive reading of the provisions of section 35, affirms the position that categories of Aboriginal peoples cannot, for constitutional purposes, be considered closed simply on the basis of historically determined factors.

Brian Slattery has also made suggestions concerning the criteria to be adopted in determining whether peoples are to be regarded as 'Native' for the purpose of obtaining constitutional entitlements. After stating that

[h]istorically, groups composed mainly or entirely of Métis or "half-breeds" have been accepted as native groups and this fact is now recognized in s.35(2) of the *Constitution Act, 1982* which states the phrase "aboriginal peoples of Canada" as used in the *Act* includes the Indian, Inuit, and Métis peoples of Canada.⁶⁹

Slattery goes on to list a number of factors that should be considered when a determination is to be made as to whether a group of people should be regarded as 'Native'. Among these factors are the self-identity of the group, its culture and way of life, the existence of group norms or customs similar to those of other Aboriginal peoples, and the genetic composition of the group.⁷⁰

The Supreme Court has recognized section 35 and the purposive approach

To the scholars adopting what has been characterized as a purposive understanding of section 35 has been added an authoritative pronouncement by the Supreme Court of Canada in 1990. In *R. v. Sparrow*, the Court gave its first extended consideration to the meaning and purpose of section 35. In that judgement, a unanimous court stated:

It is clear, then, that s.35(1) of the *Constitution Act, 1982* represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of

native associations and other groups concerned with the welfare of Canada's aboriginal people made the adoption of s.35(1) possible and it is important to note that the provision applies to the Indians, the Inuit, and the Métis.⁷¹

With regard to the interpretation of the provisions of section 35, the court said:

The nature of s.35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s.35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the *Constitution Act, 1982*, which deal with aboriginal rights, it said the following at page 322 [page 168 C.N.L.R.]:

“The submission would give no meaning to s.35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the near future.... To so construe s.35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that the principle applies less strongly to aboriginal rights than to the rights guaranteed by the *Charter* particularly having regard to the history and to the approach to interpreting Treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.* [1983] 1 S.C.R. 29”....⁷²

With this perspective, it is difficult to maintain that the provisions of section 35 have no meaningful content for Métis. As the Supreme Court held in *Sparrow*, “...s.35(1) is a solemn commitment that must be given meaningful content.”⁷³ To have given the Métis recognition in the Constitution of Canada as an Aboriginal people and to then maintain that this means nothing in terms of substantive entitlements would be unacceptable. Such a general proposition cannot detail the content of the rights to be enjoyed in any particular case, but

it does establish that there must be some bundle of rights that are the entitlements of some identifiable group, or groups, of Métis.

Section 35, Charlottetown and federal policy make 91(24) inclusion less crucial

This scholarly and judicial consideration of section 35 is relevant to the issue of section 91(24) and its jurisdictional implications for Métis. In our view, the effect is to make this issue less crucial. The delineation of substantive rights in section 35 will ultimately determine issues of both jurisdiction and legal obligation. Jurisdiction will thus be an implication of entitlements, rather than the reverse. This fact represents one of the most significant elements in the constitutional protection now afforded treaty and Aboriginal rights by the Constitution of Canada.

Before the adoption of the *Constitution Act, 1982*, the only way Aboriginal peoples could obtain recognition of separate jurisdictional status was to be regarded as 'Indians' and thus subject to special federal jurisdiction under section 91(24) of the *Constitution Act, 1867*. Since for many recognition was seen as a cornerstone for survival, Métis groups sought inclusion in 91(24). The logic was that recognition of their Aboriginal status by the government of Canada would also strengthen legal arguments that Métis should receive special entitlements as incidents of Aboriginal status.

From the 'recognition' perspective, 91(24) is now less crucial. The Constitution of Canada explicitly recognizes Métis as having distinct juridical status as an Aboriginal people, with some as yet to be determined group of rights. Since two of the three Aboriginal groups recognized as such in section 35 are regarded as 'Indians' for purposes of section 91(24), it is submitted that it is not possible to interpret 91(24) in isolation from section 35. These two sections of the

Constitution must be read together. This principle received explicit recognition in the Charlottetown Accord, which stated:

91A. For greater certainty, class 24 of section 91 applies, except as provided in section 95E, in relation to all the aboriginal peoples of Canada.⁷⁴

Under this proposed amendment, ‘Indian’ was to be constitutionally a synonym for ‘Aboriginal’. The effort made by so many Métis to effect this change had been rewarded.

Section 35 of the *Constitution Act, 1982* provided a foundation for recognizing and defining Métis Aboriginal rights. The Charlottetown Accord built on that foundation. Although the Accord was rejected by the people of Canada and did not become law, it provides a starting point for defining law in the future. By explicitly identifying the categories enumerated in section 35(2) of the *Constitution Act, 1982* with the general category of ‘Indians’ in section 91(24) of the *Constitution Act, 1867*, it made the proper constitutional connection. That connection will not be forgotten as attempts are made to further define the meaning and content of the constitutional rights of Aboriginal peoples in Canada.

In some ways, the identification of Métis as section 91(24) Indians will solve jurisdictional uncertainties. If this identification is definitively established, either through future constitutional or other jurisdictional agreements, or as a result of legal determinations, it will finally be clear that the federal government has constitutional responsibility for dealing with the Métis.

The significance of 91(24) inclusion is reduced by another consideration: federal jurisdiction does not imply federal action.⁷⁵ For example, the Parliament of Canada has long been acknowledged to have exclusive jurisdiction over Inuit and non-status Indians but that *authority* to act has not always produced an attendant *resolve* to act.

Confirming that the Métis fall under the exclusive legislative authority of the Parliament of Canada will not answer the most perplexing questions raised by section 35 with regard to Métis people. The problems of definition (Who are the Métis?) and entitlements (What Aboriginal and treaty rights do they enjoy?) will not be much advanced by the mere constitutional recognition that Métis are section 91(24) Indians. In order for a grant of federal jurisdiction to convey something concrete to the Métis, some type of legally *recognizable* or *enforceable* obligation will have to attach to this jurisdiction. This issue takes us to the heart of section 35 guarantees.

The reality is that the Métis are faced by many of the same dilemmas as off-reserve status Indians with regard to the definition of section 35 entitlements. If there is no agreement among Canadian jurisdictions to further define in formal constitutional terms what these entitlements may be, other means will have to be used to effect such definitions. This paper explores some of these means.

As in the Charlottetown agreement, however, different groups of Métis will have to use a variety of methods to give some content to the provisions of section 35. This may well result in a range of legal regimes offering recognition of different kinds of rights to different types of Métis communities. This situation will not be peculiar to the Métis, however. It is already true among status Indians and, depending upon constitutional evolution in Canada, it may become more and more the case among them as well.

The Role of Litigation in Establishing Métis Rights

Manitoba Métis raise fundamental issues in the Dumont case

One means of defining and enforcing legal entitlements is through court actions. Since the adoption of the *Constitution Act, 1982*, this has been a

method increasingly used by Indian claimants. For some groups of Métis, it may be productive of results as well. One instance of the use of this approach is the case of *Dumont et al. v. Attorney General of Canada and Attorney General of Manitoba*. This case offers an instructive model of an attempt to obtain a judicial definition of Métis rights that may be used by other groups of Métis claimants in the future.

*Dumont et al. v. Attorney General of Canada and Attorney General of Manitoba*⁷⁶ is a lawsuit concerning the allocation of land to Métis residents of Manitoba under the provisions of the *Manitoba Act, 1870*. The relevant provisions of the Act are found in sections 31 and 32:

31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

32. For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:

(1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

(2) All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

- (3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
- (4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.
- (5) The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.⁷⁷

The plaintiffs are officers of the Manitoba Métis Federation (a constituent organization of the Métis National Council) suing on their own behalf and on behalf of the descendants of all Métis persons entitled to benefits under the *Manitoba Act*. The Native Council of Canada is also a plaintiff in the action.

A number of complex issues are raised by this litigation, but the essence of the claim is that significant alterations were made by both the Parliament of Canada and the Manitoba legislature to the land rights promised the Métis community under the *Manitoba Act* subsequent to the passage of that Act by the Parliament of Canada and its confirmation by the Imperial Parliament in 1871 (the *British North America Act, 1871*, now known as the *Constitution Act, 1871*).⁷⁸

The plaintiffs allege that because of these alterations, approximately 85 per cent of the Métis who were to benefit from the land distribution scheme established under the Act failed to benefit.⁷⁹ It is the contention of the plaintiffs that these changes in the land

distribution scheme mandated by the *Constitution Act, 1871* were beyond the powers of either the Canadian Parliament or the Manitoba legislature. The Act states explicitly that only certain of its provisions may be altered, and those contained in sections 31 and 32 are not among these. As a result, the plaintiffs are seeking a declaration that these alterations are invalid and of no effect.⁸⁰

The plaintiffs in *Dumont* contend that the impugned legislative acts by Canada and Manitoba are beyond their jurisdictions. They also claim that the activities of the Manitoba legislature are doubly illegitimate because legislative authority concerning Métis beneficiaries of the *Manitoba Act* falls exclusively within the competence of the federal Parliament. The reason for this is that the Métis should be considered Indians under the terms of section 91(24) of the *Constitution Act, 1867*.⁸¹ Thus, from the plaintiffs' perspective, the *Dumont* case turns upon the exercise of legislative power without valid authority, a familiar argument in the jurisprudence of Canadian federalism.

However, in a statement of claim on the same matter,⁸² filed against Her Majesty in the Federal Court of Canada, the same plaintiffs specifically plead their Aboriginal entitlements. In this pleading the plaintiffs allege that a number of imperial enactments — the *Royal Proclamation of 1763*; the *Constitution Act, 1867*, section 91(24); the *Rupert's Land Act, 1868* and the *Rupert's Land Order, 1870* — establish a fiduciary relationship between the Crown and the Métis as an Aboriginal people.

The *Manitoba Act, 1870* is also alleged to have created a fiduciary relationship between the Crown and members of the Red River Métis community and their descendants with regard to the land allotments and the allocation of other rights promised under the Act. The allegation is then made that the Crown breached these fiduciary

obligations to the Red River Métis and their descendants through its failure to ensure that the promises made in the *Manitoba Act* were properly implemented.⁸³ As a remedy, the plaintiffs are requesting

- a declaration that, in connection with rights promised them in *Manitoba Act*, the Crown was in breach of its fiduciary obligations to the members of the Red River community and their descendants as well as being guilty of fraud or fraudulent breach of trust;
- damages to make good the losses suffered by the plaintiffs due to this conduct by the Crown; and an order that the Crown provide the Métis with alternative lands.⁸⁴

Dumont raises the issue of fiduciary duty to Métis

The pleadings of Dumont et al. in these actions illustrate the nature and the variety of legal arguments that are open to at least some groups of Métis claimants under the legal and constitutional order that now exists in Canada. More traditional arguments based on jurisdictional considerations are joined with assertions about the Crown's fiduciary obligations toward Aboriginal peoples, which it is the Crown's legal duty to fulfil.

The assertions regarding the Crown's fiduciary obligations made by Dumont et al. raise a powerful argument that has, since the decision of the Supreme Court of Canada in *Guerin v. The Queen*,⁸⁵ been used frequently in legal proceedings by status Indian plaintiffs to compel the federal Crown to honour commitments made by it to Indian people.

The facts in *Guerin* concerned the long-term surrender of Indian reserve lands to the Crown for lease. The Supreme Court of Canada's decision in the case was well summarized by the Court in *Sparrow*:

This court [in *Guerin*] found that the Crown owed a fiduciary obligation to the Indians with respect to their lands. The *sui generis* nature of Indian title, and the historic powers and

responsibility assumed by the Crown constituted the source of such a fiduciary obligation.⁸⁶

Although the plaintiffs in *Dumont* are not status Indians, and although the lands in question were not reserve lands, the Métis claimants are clearly an Aboriginal people, and the land benefits promised to them by the *Manitoba Act* were given explicitly toward the extinguishment of “Indian title to the lands in the province.”

The *Guerin* principles of fiduciary obligation were taken out of their explicit factual context by the Supreme Court of Canada itself in its decision in *Sparrow*. As the court stated,

In our opinion, *Guerin* together with *R. v. Taylor and Williams* (1981) 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, ground a general guiding principle for s.35(1), that is, the Government has the responsibility to act in a fiduciary capacity with respect to *aboriginal peoples*. The relationship between the Government and *aboriginals* is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.⁸⁷
[emphasis added]

Here the court is taking principles formulated with respect to status Indian reserve land transactions and extending them to define the Crown’s relationship with Aboriginal peoples generally. In fact, this is done explicitly in *Sparrow*.

We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principle outlined above, derived from *Nowegijick* [a Supreme Court of Canada decision that ruled that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians], *Taylor and Williams* [an Ontario Court of Appeal decision that held that Indian rights should not be determined in a vacuum since the honour of the Crown was involved in the interpretation of Indian treaties and, as a result, fairness to Indians must be the governing consideration] and *Guerin*, should guide the interpretation of s.35(1). As commentators have noted, s.35(1) is a solemn commitment that must be given meaningful content.⁸⁸

It is not difficult to see how such principles apply to a fact situation such as that pleaded in *Dumont*. Members of the Red River community, having an Aboriginal right to the lands that they occupied recognized explicitly by the government of Canada in the *Manitoba Act*, agreed to give up certain claims they had to this land in exchange for the consideration offered them in the *Manitoba Act*. This statute, made part of the Constitution of Canada by the Imperial Parliament, gave solemn undertakings to deal with an Aboriginal people in certain stated ways. It is now claimed that these undertakings were explicitly breached. Arguably, if the Crown's conduct was as the plaintiffs claim, the remedy should be similar to that provided Indian plaintiffs alleging similar circumstances.

A further conceptual point might be made in connection with the *Dumont* proceedings, and it has been made in the work of Paul Chartrand.⁸⁹ The same observation has also been made in pleadings prepared by the other plaintiff in the *Dumont* case, the Native Council of Canada,⁹⁰ and in the dissenting judgement of Mr. Justice O'Sullivan in the Manitoba Court of Appeal decision in *Dumont*.⁹¹

The point made in all of these materials is that section 31 of the *Manitoba Act* is in essence a land claims agreement or 'treaty' whose provisions are now protected by section 35 of the *Constitution Act*, 1982. As Chartrand has stated,

Section 31 can take on a contemporary significance as a part of the national land claims agreement process involving aboriginal peoples and the Crown. Abbe Ritchot, the special negotiator for the Métis, bargained with the federal ministers in 1870 to obtain lands in satisfaction of the Métis claim and section 31 [of the *Manitoba Act*] expressly recognized its object of extinguishing Métis Indian title to the lands in the province. In terms, then, section 31 is a land claims agreement and is therefore arguably entrenched as one of the "treaties" which are now afforded protection in s.35 of the *Constitution Act*, 1982.⁹²

O'Sullivan J.A. also articulated this view of the *Manitoba Act*:

The *Manitoba Act* sanctioned by imperial legislation, is not only a statute; it embodies a treaty which was entered into between the delegates of the Red River Settlement and the imperial authority.⁹³

The implications of Dumont may differ for different Métis

The plaintiffs in *Dumont* have faced difficulties in pursuing their action. In 1988, the Manitoba Court of Appeal granted an application brought by the federal government to have the claim struck down on the ground that it disclosed no legal cause of action. The grounds upon which the Court granted the application may be instructive for other Métis claimants.

Among other determinations, the Court of Appeal found that the land rights created under section 31 of the *Manitoba Act* were individual rights and did not create a community of interest for Métis people. More significantly, however, the Métis claimants had indicated to the Court that their principal interest in obtaining the requested declaration was to assist them in negotiating a *political* settlement of their outstanding claim to land, in compensation for the losses they and their ancestors had suffered in the 1870s and '80s. The Manitoba Court of Appeal decided (with Mr. Justice O'Sullivan in dissent) that such a declaration would be of no real advantage to the plaintiffs.⁹⁴

On appeal, the Supreme Court of Canada disagreed and set aside the decision of the Manitoba Court, allowing the *Dumont* litigation to proceed. As Madam Justice Wilson stated for the Court,

The Court is of the view also that the subject matter of the dispute, inasmuch as it involves the constitutionality of legislation ancillary to the *Manitoba Act*, is justiciable in the courts and that declaratory relief may be granted in the discretion of the court in the aid of extra-judicial claims in an appropriate case.⁹⁵

The implications of this proceeding should be noted. In *Dumont*, the plaintiffs are simply seeking a statement from the court that, if granted, will materially assist them in negotiating with the federal and provincial governments a resolution of their outstanding land claim. Without recognition of a legal entitlement of some kind, Manitoba Métis claimants have had no success in obtaining the land base they feel to be crucial to their continuing existence as an autonomous people. As Douglas Sanders has observed in connection with litigation of a similar kind initiated by status Indians,

...Indians needed some recognition of rights — some cards — some status — if negotiations had any chance.⁹⁶

The same statement applies, with even greater force, to Métis claimants. As a result, one of the principal objectives in *Dumont* is to obtain a legal basis upon which political negotiations can begin, and perhaps be attended with some success.

There is, in summary, a broad range of potential arguments, drawn from the existing jurisprudence on status Indian matters and the application of this jurisprudence to the judicial interpretation of section 35 of the *Constitution Act, 1982*, that are readily applicable to the situations of Métis claimants such as those in *Dumont*. Should any of these arguments be successful they may lead to a legal determination of specific Aboriginal entitlements, subject to all the protection and benefits that such entitlements now possess under Canadian law.⁹⁷

There is, however, one immediately apparent difficulty with this approach, at least as an exclusive focus for all Métis communities throughout Canada. Very few such potential claimants are situated similarly to those in *Dumont*. Other groups in western Canada (scrip takers or their descendants under various Dominion Lands Acts), or Métis communities in Northwestern Ontario whose ancestors attempted to adhere to Treaty No. 3, may be able to make such arguments. Many

other self-defining Métis communities are not so fortunate. For them, this approach to defining Aboriginal entitlements may be less successful.

For Métis generally, both litigation and land claims are difficult

The difficulties in pursuing a litigated definition of Aboriginal entitlements are well known, even for status Indian claimants. In establishing a right to land based on possession of Aboriginal title, absent a formal agreement to make land available, Métis claimants, like all Aboriginal plaintiffs, may be held to the test for establishing such title laid down in *Hamlet of Baker Lake v. Minister of Indian Affairs*.⁹⁸

In this case the court established a four-part test:

1. That the aboriginal plaintiffs and their ancestors be members of an organized society;
2. That the organized society occupied a specific territory over which the aboriginal title is asserted;
3. That the occupation was to the exclusion of other organized societies; and
4. That the occupation was an established fact at the time sovereignty was asserted by England.⁹⁹

Although frequently criticized in the academic literature,¹⁰⁰ this decision remains good law and has been applied very recently in the case of *Delgamuukw v. British Columbia*.¹⁰¹ It would be a difficult test for many potential Métis claimants to meet.

There are also difficulties with the land claims approach. A plausible case can be made for viewing the *Manitoba Act* as a land claims agreement that may be construed, under the terms of section 35(3) of the *Constitution Act, 1982*, as giving treaty rights to the beneficiaries of the agreement.¹⁰² Historically, however, many communities of self-identifying Métis people have never entered into such agreements, and as a result there is no documented standard against

which the conduct of governments toward such groups may be judged and found to be deficient in law.

Statutory obligations, such as those assumed by the federal government under the *Dominion Lands Act* toward scrip recipients, may offer a basis for pursuing legal claims against the government of Canada, with some prospect of a specific remedy if the litigation is successful. However, there are many Métis communities in Canada that have never been the beneficiaries of such schemes or that have never received an acknowledgement by the government that it has any obligation toward them at all. For such communities, articulation of Aboriginal rights through litigation poses some major, perhaps insuperable, difficulties.

Difficulties with fiduciary obligations and the 'existing' rights requirement

Some communities may choose to rely solely on the recognition of Aboriginal rights provided for in section 35 of the *Constitution Act, 1982* and press forward with the weapons provided in judicial decisions such as *Guerin* and *Sparrow*. The concept of a unique set of fiduciary obligations, owed to Aboriginal peoples by the Crown, that has begun to be defined in these judgements may offer some assistance to Métis plaintiffs.

To date, however, the relief offered Aboriginal claimants in these judgements has turned on highly particular findings of fact, involving the exercise of a well recognized Aboriginal entitlement (use of Indian reserve lands, Aboriginal right to fish for food) and failure by the government properly to assist Aboriginal beneficiaries in the continuing enjoyment of that entitlement. Only those Métis claimants who could make a strong case that their Aboriginal entitlements would fit within

the same set of categories could anticipate much success in a litigated defence of these rights.

Finally, the qualification in section 35 that only the *existing* Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed must be noted. *Sparrow* establishes clearly that rights extinguished before 1982 are not revived by the *Constitution Act, 1982*:

The word existing makes it clear that the rights to which s.35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*.¹⁰³

Although *Sparrow* establishes a fairly stringent test by which extinguishment is to be proven, many Métis claimants may face difficulty in showing that the Aboriginal rights they possessed were not extinguished prior to 1982.

In conclusion, although litigation may offer the prospect of success to some groups of Métis claimants, it is not a tactic that can be relied upon by all such claimants. Other means of asserting and protecting Métis Aboriginal identity will have to be found. Among the most promising of these is participation in comprehensive land claims agreements, where that is a possibility. For the Métis communities of the Western Arctic, this is a route that is already being taken.

Comprehensive Land Claims Agreements Create a Framework

Federal government policy provides for comprehensive claims

In the early 1970s, the government of Canada made a policy determination that there would be two major types of claims agreements with Aboriginal peoples. 'Specific claims' would deal with claims made against the Crown that related to the administration of land and other Indian assets and to the fulfilment of treaties.¹⁰⁴ 'Comprehensive

claims' would designate claims based on traditional Aboriginal use and occupancy of land and would deal with a broad range of subjects — land, hunting, fishing, trapping rights and associated economic benefits.¹⁰⁵

There are a number of comprehensive claims areas in Canada, located for the most part where no treaties or half-breed scrip had attempted to deal with Aboriginal interests in the land. Although treaties had been made with the Indian residents of the Mackenzie Valley in the Western Arctic, and although half-breed scrip had been issued there as well, the government of Canada decided to treat the entire region as a comprehensive claims area. In the mid-1970s, negotiations toward settlement of a comprehensive claim were begun by the government of Canada jointly with Dene Indians and Métis, represented by territorial organizations.

The Dene/Métis agreement provides an example

The Dene/Métis comprehensive claim agreement was under negotiation for a number of years, and a draft final text was initialled by both parties in April 1990.¹⁰⁶ This draft agreement was never finally ratified, and Aboriginal groups in the Western Arctic are proceeding with claims settlements on a regional basis. One such settlement has been ratified, another has been accepted by its Aboriginal beneficiaries in a referendum, and a third is at the opening stages of negotiation. To date these regional claims settlements have proceeded within the general parameters set out in the Dene/Métis Comprehensive Land Claim Agreement.

Under the terms of the Dene/Métis Comprehensive Land Claim Agreement, Dene Indian communities and the Mackenzie Valley Métis communities were to be equal beneficiaries. The agreement provided a

land base for the Aboriginal participants,¹⁰⁷ financial payments,¹⁰⁸ and a designated share in resource revenues generated in the claims settlement area.¹⁰⁹ The Aboriginal participants were to enjoy certain priorities in wildlife harvesting as well as the right to extensive hunting, fishing and trapping entitlements throughout the settlement area.¹¹⁰ Further, the draft agreement established an extensive regulatory regime for land and water management within which the Aboriginal participants were to play a major role.¹¹¹ The agreement did not make provision for self-government, but it did establish that once it had been ratified, self-government negotiations would follow.¹¹²

This comprehensive claims approach extended the same rights to both Indian and Métis participants. It provided these participants with land, money, protected resource use and a significant share of decision-making power regarding development in the Western Arctic. The agreement would have required ratification by Parliament as well as the Aboriginal participants and, given the provisions of section 35(3) of the *Constitution Act, 1982*, would have received the protection given treaty rights by section 35(1) of that Act.

From most perspectives, this was an optimal situation for Métis participants. The federal government was, through the negotiation of the agreement, explicitly acknowledging the right of Métis to participate in, and benefit from, Aboriginal claims agreements. Special entitlements, based upon Aboriginal status, were guaranteed to Métis communities under the agreement, and a land base was to be provided to them. The self-government agreements that were to follow the ratification of the land claim agreement would have established a basis for Métis self-government.

Even though the Dene/Métis Comprehensive Land Claim Agreement was never finally ratified, regional settlements with the same general terms and provisions have been or are being negotiated in some

other parts of the Western Arctic. Where this is the case, Métis communities have the opportunity to negotiate a package of constitutionally protected Aboriginal rights and obtain a land base without resorting to legal action. Although there may be differences about the value and desirability of specific parts of such agreements, as a general approach to obtaining Aboriginal entitlements, they offer many obvious advantages to Métis communities.

The difficulty is that, as with a litigated approach to rights, there are very few Métis communities that can avail themselves of the comprehensive claims approach. The Métis residents of the Western Arctic may be fortunate that through an almost unique combination of circumstances, a comprehensive claims approach is open to them. Most of the Métis communities in Canada do not enjoy the same combination of circumstances; consequently they must find other means to protect their Aboriginal identity.

PART 3 — THE CHARLOTTETOWN ACCORD: CREATING A NEW FRAMEWORK

Charlottetown — Tools to Build on the 1982 Foundation

The Constitution Act, 1982 provided recognition without clarification
Before the *Constitution Act, 1982*, the most straightforward way for Métis to achieve constitutional recognition as an Aboriginal people was to be included with Indians in class 24 of section 91 of the *British North America Act, 1867*. This clause in Canada's founding constitution establishes Parliament's exclusive authority to legislate with respect to "Indians, and Lands reserved for the Indians". The decision by the Supreme Court of Canada that "Indians" included the Inuit meant to many that it was the benchmark of recognition as a *people* present at the creation of the country. This acknowledged the existence of Aboriginal

founding peoples in Canada's basic constitutional document. The only other people so recognized were the French Canadians.

The *Constitution Act, 1982* preserved the recognition of Aboriginal peoples but made it more explicit and meaningful. In particular, section 35

recognized Aboriginal and treaty rights,
recognized Métis as an Aboriginal people, and
enabled Aboriginal peoples to acquire treaty rights by land
claims agreements.

The Constitution thus clearly recognized the Aboriginal rights of Métis. It did not, however, say what those rights were or who held them. Consequently it raised new questions about the legal framework of jurisdictions, duties and rights for the Métis.

As indicated in Part 2 of this paper, providing a generic and definitive answer to the 91(24) inclusion question on the basis of historical evidence is difficult. Scholarly opinion has been divided, partly because there is no common definition of Métis. However, when the status and rights of Métis were recognized in section 35, the role of 91(24) inclusion for such recognition became less critical. The question, do the Métis have Aboriginal rights?, has been answered "Yes!". The new question is, what are they? To be more precise, what are the Aboriginal and treaty rights of Métis under section 35? Although the *Constitution Act, 1982* provided for a series of first ministers conferences that could address this question, the conferences were inconclusive. Without a formal process in place, Métis leaders were left with a fundamental question for the 'old' Constitution — are the Métis in 91(24)? — and for the 'new' Constitution — what rights do they have under section 35?

The only source for an answer appeared to be the courts. Unfortunately, that rigorous and antagonistic atmosphere was unlikely to

provide broad public policy answers. The analytic approach of the courts would more likely proceed along the lines of, what Métis? What rights? Who owes them? Who holds them? In the context of litigation, these questions would likely be answered no more broadly than needed to address the issues at hand.

The Charlottetown Accord held out the hope of answering the basic questions of jurisdiction, duties and rights in a broader and more constructive context. Although that initiative failed, it is worth reviewing because

it was developed with significant Métis participation,
it may still have legal influence, and
it contains ideas for new approaches.

The Charlottetown Accord developed a framework that remains relevant

Canadians rejected the package of constitutional amendment proposals agreed to by Aboriginal leaders and first ministers at the Charlottetown conference in August 1992. If adopted, the amendments and related accords would have created a new constitutional framework for relations between federal, provincial and Aboriginal governments. The package included proposed amendments to both the *Constitution Act, 1867* and the *Constitution Act, 1982*. Those amendments would have confirmed the Métis as exclusively¹¹³ within federal jurisdiction and recognized Aboriginal governments as a third order of government distinct from federal and provincial governments.

The proposals may have legal influence even though they were not formally incorporated in the Constitution. The package represents an agreement between leaders of the constitutionally recognized Aboriginal groups and the first ministers of all provinces and Canada. As such it is historic. A lack of public support does not mean it will be ignored by the courts. In fact, the courts may find the Charlottetown Accord and its

accompanying political accords and legal text helpful when divining the contents of the existing Aboriginal rights” included in section 35. Furthermore, it is highly unlikely that, if faced with the generic question, are Métis included in 91(24)?, the courts would give a blanket “No!” in the face of such an agreement. In that context, it is useful to consider certain parts of the package even though they may never become a constitutional amendment.

Charlottetown proposed a comprehensive set of changes

The Charlottetown Accord included a consensus report of ministers, best efforts legal text of proposed constitutional amendments, and attendant political accords with representatives of Aboriginal peoples. The parts of the package particularly relevant to Métis were:

- The Consensus Report on the Constitution, August 28, 1992, (including Final Text and Political Accords);
- Amendments to the *Constitution Act, 1867*,
 - Canada Clause provisions
 - Application of 91(24) to all Aboriginal peoples (91A)
 - Concurrent jurisdiction in Alberta (95E)
 - Non-derogation of jurisdictional provisions (127);
- Amendments to the *Constitution Act, 1982*,
 - Accord on Aboriginal Constitutional Matters
 - Métis Nation Accord
 - Alberta Act Amendment.

Given the nature of the package and the amount of material it contained, it is impossible to predict with any certainty what impact it would have had on the Métis and their relationship with federal and provincial governments. However, the package did three fundamentally important things:

- **confirmed jurisdiction** - it confirmed that Métis are within the federal jurisdiction provided by section 91(24);
- **recognized authority** - it recognized that Aboriginal governments derive their authority from their own people and

accepted these governments as a third order of government in Canada;

- **provided a framework** - it provided a solid legal framework for determining how the inherent authority of Aboriginal governments could be implemented.

In short, it provided a foundation and a process for resolving many of the jurisdiction, duties, and rights issues related to the survival of Métis. The significance of that accomplishment should not be underestimated.

The Charlottetown Accord proposed amendments to the *Constitution Act, 1867* and the *Constitution Act, 1982*. From the perspective of the Accord's effect on the Métis, the *Constitution Act, 1867* was to be amended to provide a 'characteristics of Canada' interpretation guide, to confirm that Métis are within federal jurisdiction, to enable Alberta's Métis legislation to stand in spite of this, and to ensure that the redistribution of powers between provincial and federal governments did not detract from federal jurisdiction and responsibilities.

The *Constitution Act, 1982* was to be amended to recognize the inherent right of self-government, to provide a means for defining it, and to address related Charter issues. This was done by replacing section 35.1, the commitment to constitutional conferences, with a series of sections dealing with the inherent right of self-government. These sections

- recognized the inherent right of self-government [35.1];
- provided a means for implementing the right [35.2];
- delayed legal action on the right for five years [35.3];
- related Aboriginal governments' laws to other laws [35.4];
- enabled affirmative action by Aboriginal governments [35.5];
- provided for interpreting and implementing treaties [35.6];
- protected gender equality [35.7];
- provided for consultation before future amendments [35.8]; and
- ensured four more conferences on Aboriginal issues [35.9].

The provisions relating to the *Canadian Charter of Rights and Freedoms* were also amended so that the Charter did not reduce Aboriginal peoples' rights to exercise or protect their language, culture and traditions [section 25(c)]. The Charter would, however, apply to Aboriginal governments [section 32], subject to the 'notwithstanding' provision that is available to the federal and provincial governments.

The Canada Clause provided a context for interpretation

The Accord proposed amending the *Constitution Act, 1867* by adding as section 2 a 'Canada clause' expressing fundamental Canadian values. As part of the Canadian Constitution this clause was to guide the courts in interpreting the entire Constitution. The Charlottetown proposals may be dead, but the fact remains that all first ministers and representatives of national Aboriginal organizations agreed on the Canada clause as a shared vision of the place of Aboriginal peoples and their governments in the Canadian system. The courts are unlikely to dismiss this consensus vision as irrelevant when called on to determine, particularly in relation to self-government, the contents of the existing Aboriginal and treaty rights protected by section 35.

The components of the Canada clause particularly relevant to Métis were as follows:

- 2.(1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:
 - (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
 - (b) the Aboriginal peoples of Canada, being the first people to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;...
 - (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who

have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;

(f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;

(g) Canadians are committed to the equality of female and male persons;¹¹⁴

These clauses said the courts should be guided by the recognition that

- Canada is a democratic, parliamentary, federal system;
- in that system Aboriginal governments are a third order of government;
- Aboriginal peoples have the right to promote their cultures and ensure the integrity of their societies;
- Canadians are committed to racial, ethnic, and gender equality and to a respect for individual and collective human rights.

These interpretation guidelines are qualified by subsequent clauses that say the guidelines do not derogate from the powers of legislative bodies or governments, including Aboriginal governments, or from Aboriginal and treaty rights.

In short, the Canada clause would have provided the fundamental guidelines for interpreting the entire Canadian Constitution, including the Charter. The courts, when interpreting a provision of the Constitution in respect to Aboriginal peoples, would need to keep in mind that

- these people were the first to govern this land,
- they have the right to ensure the integrity of their societies, and
- they are the source of their governments' authority, not Parliament or a provincial legislature.

The last assertion follows logically from the recognition of Aboriginal governments as a third order of government. This is a fundamentally

different view of the legal relationship between Aboriginal peoples and governments in Canada. It also represents the core of a new approach that may be possible even without constitutional amendment. We explore that approach later in this paper.

While providing a new recognition of the right of Aboriginal peoples to govern themselves, the Canada clause would have required the courts to be mindful of the Canadian commitment to racial and ethnic equality and to respect for individual and collective human rights — without taking anything away from treaty or Aboriginal rights. This might have been a tall order for the courts, but it provided at least some guidelines to fill the current vacuum. At a minimum these statements would have provided a very general context for considering the scope of self-government rights. They were essentially positive statements. In simplest terms, they recognized Aboriginal peoples' right of self-government.

Subsection 2(3) of the Canada clause went on to say that the recognition of the right of self-government had limits. It would not alter existing powers. In other words nothing in the Canada clause could be construed as removing any powers from the legislative or executive bodies of Canada, a province, or Aboriginal peoples. It is a well accepted principle of Canadian constitutional law that at any moment all powers in the federal system are in the hands of some legislative body. In this zero sum game of power sharing, if no body loses powers, no body gains powers. At the moment Canadian law considers most legislative powers as belonging either to Parliament or to provincial legislatures. The exception would be those Aboriginal governing bodies whose powers are recognized by special legislation or land claims agreements. The Canada clause would have taken nothing away from the legislative authority of those bodies, but also could not have been relied on as a basis for additional powers for Aboriginal governments.

That basis would have had to be defined in self-government agreements. To ensure such agreements were made, the package included amendments to the *Constitution Act, 1982* requiring all governments to negotiate in good faith the implementation of the right of self-government.

In other words the Canada clause recognized that there were three hands that could hold 'sticks' from the bundle of law-making powers — federal, provincial, and Aboriginal. But it did not move any sticks from one hand to another. The determination of which sticks would be in Aboriginal hands was left to negotiation. Other parts of the package ensured that those negotiations would proceed promptly and in good faith.

Class 91(24) would apply to all Aboriginal peoples, with some provisos

For the Métis, one of the most significant of the proposed amendments was the addition of a section to the *Constitution Act, 1867* confirming that the exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians" applies to all of the Aboriginal peoples of Canada. The proposal would have added a section 91A stating:

For greater certainty, class 24 of section 91 applies, except as provided in section 95E, to all of the Aboriginal people of Canada.¹¹⁵

This amendment would have resolved the long-standing question of whether Métis are caught by the federal jurisdiction provided by class 91(24). It created a new problem in Alberta, however, because of provincial legislation with respect to Métis.

In 1938 the Alberta legislature passed the *Metis Population Betterment Act*, making it possible to reserve lands as settlement areas for the Métis of the province. Métis settlement associations were established to occupy the areas set aside and provide a form of a quasi-

local government. In 1989, after extensive negotiations, representatives of these associations and the provincial government signed the Alberta-Métis Settlements Accord agreeing to a new land-holding and self-government scheme for the settlements and providing a means of resolving a long-standing law suit over revenue from oil and gas found in the settlement areas. In 1990, the Alberta legislature passed four acts to implement the Accord.

The proposed constitutional changes threatened the 1990 Alberta legislation, since they implied Alberta's legislature had acted outside its jurisdiction by legislating with respect to Métis and their lands — an area exclusively within the law-making power of Parliament. To solve this problem, a proposed section 95E was agreed to:

In the context of section 91A the legislature of the Province of Alberta may make laws, and the Parliament of Canada may make laws, in relation to the Métis in Alberta and to Métis settlement land in Alberta and, where such a law of Alberta and a law of Parliament conflict, the law of Parliament prevails to the extent of the conflict.

This provided that in Alberta the province had concurrent, although subordinate, jurisdiction with respect to the Métis.¹¹⁶

The proposed changes to the *Constitution Act, 1867* raised one other issue relevant to Aboriginal peoples — the effects of proposed changes in federal and provincial jurisdiction. Aboriginal representatives were concerned that the realignment of jurisdictions might affect federal powers or responsibilities, or treaty and Aboriginal rights. To address that concern, the package included an amendment to section 127 ensuring that none of the sections modifying jurisdiction detracted from Aboriginal rights and federal responsibilities.

While the proposed amendments to the *Constitution Act, 1867* provided a context for interpreting Aboriginal rights of self-government and for clearing up questions on federal and provincial jurisdiction with respect to Métis, the major provisions for recognizing and implementing self-government were changes to the Aboriginal rights parts of the *Constitution Act, 1982*. Section 35 of that Act had recognized existing Aboriginal rights but given no explanation of what those rights were. Section 35.1 committed the governments of Canada and the provinces to hold conferences with Aboriginal representatives before amending any of the ‘Aboriginal’ provisions of the Constitution. The Charlottetown Accord proposed replacing section 35.1 with a series of sections (35.1 through 35.9) that would provide for the recognition and implementation of an inherent right of self-government for the Aboriginal peoples of Canada.¹¹⁷

The question, what does self-government mean?, was heard many times before and after Charlottetown. The core concept is a community’s capacity to determine who will make decisions for it and to determine what kind of decisions they can make. Within that concept, however, the scope of self-government could range anywhere from the nothing of colonialism to the everything of sovereignty. The Charlottetown Accord did not define where in this spectrum the “inherent right of self-government” would fall. Instead it left that to governments and Aboriginal peoples to flesh out in self-government agreements. It did, however, create a legal onus on governments to negotiate in good faith and provided an accompanying Accord on Aboriginal Constitutional Matters to govern the process for negotiations.

Section 35.1 of the proposed Constitution would have set out the basic parameters of Aboriginal peoples' inherent right of self-government in the following words:

35.1(1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

(2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

(3) The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,

(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment,

so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

(4) Where an issue arises in any proceedings in relation to the scope of the inherent right of self-government, or in relation to an assertion of that right, a court or tribunal

(a) before making any final determination of the issue, shall inquire into the efforts that have been made to resolve the issue through negotiations under section 35.2 and may order the parties to take such steps as may be appropriate in the circumstances to effect a negotiated resolution; and

(b) in making any final determination of the issue, shall take into account subsection (3).

(5) Neither the right referred to in subsection (1) nor anything in subsection 35.2(1) creates new aboriginal rights to land or derogates from existing aboriginal or treaty rights to land, except as otherwise provided in self-government agreements negotiated under section 35.2.

Given the failure of the Charlottetown proposals there is little point in a detailed analysis of what impact this provision might have had on the Métis if incorporated in the Constitution. It is still useful, however, to consider what impact it may have as a consensus view of government and Aboriginal leaders on a right to be included in section

35. As with the Canada clause provisions, it would be difficult for courts and negotiators to ignore when determining the content of existing Aboriginal rights in section 35.

From that perspective the proposed section 35.1 provided a skeleton of recognition and a process for fleshing out the skeleton through negotiated self-government agreements. The bare skeleton acknowledged that Aboriginal peoples can empower law-making bodies to

- preserve their survival as Aboriginal peoples; and
- develop and protect their lands.

The details would have to be worked out through negotiations. How those negotiations would be carried out was set out in accompanying accords.

Matters related to self-government were addressed in accords

The Charlottetown constitutional amendment proposals were accompanied by a political accord guaranteeing all Aboriginal peoples in Canada access to the negotiation process and recourse to the courts if governments did not negotiate in good faith. Although the details were not agreed on, there was consensus among Aboriginal leaders, Canada, and the provinces that this accord should also deal with the financing of self-government. The accord was to be based on recognition of the fiduciary responsibility of the federal government and the current responsibilities of provincial governments. The underlying principle was that, in the context of self-government, Aboriginal governments would be committed to providing essential services and opportunities for their communities that were reasonably comparable to those in other nearby communities. To support that effort, Canada and the provinces would

provide fiscal or other resources, taking into account the fiscal capacity of the Aboriginal governments.

A separate but related Métis Nation Accord¹¹⁸ provided some guidelines for those funding commitments and other self-government matters, at least with regard to some Métis. The Métis Nation Accord was proposed by the Métis National Council (MNC) and Métis organizations from the north and west of Canada. It was to be signed by those organizations, the federal government, and the provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. It would have committed those governments to supporting an enumeration of Métis” as defined in the Métis Nation Accord (MNA). The Métis Nation Accord defined Métis as meaning

...an aboriginal person who self-identifies as Métis, who is distinct from Indian and Inuit and is a descendant of those Métis who received or were entitled to receive land grants and/or scrip under the provisions of the *Métis Act, 1870*, or the *Dominion Land Acts*, as enacted from time to time.¹¹⁹

The Métis Nation was defined as

...the community of Métis persons in subsection a) [quoted above] and persons of aboriginal descent who are accepted by that community.¹²⁰

The MNA definition of Métis would not necessarily include all ‘section 35 Métis’ — that is, the Métis who might be included in section 35 of the *Constitution Act, 1982*. With respect to MNA Métis, however, the Métis Nation Accord would have committed governments to negotiating in good faith to implement Métis self-government, provide access to lands and resources, fund core costs of Métis institutions, and transfer funds to Métis institutions to enable them to deliver programs.

The Accord also insured that there would be discussions between Canada, the provinces and representatives of the Métis Nation with regard to the establishment of a land base, and that where land was to be provided, Canada and the provinces (except Alberta) would

...make available their fair share of Crown Lands for transfer to Métis self-governing institutions.¹²¹

For those Métis communities not caught by the Métis Nation Accord, however, the issues of jurisdiction, rights and duties were not addressed so clearly in the Charlottetown Accord.

Métis settlements were protected by an amendment to the Alberta Act

A final part of the Charlottetown Accord package was a proposal to amend the *Alberta Act*. In the Alberta-Metis Settlements Accord,¹²² the province made a commitment to try to protect Métis settlement lands in the Constitution of Canada by amending the *Alberta Act*. This was to be done by using section 43 of the *Constitution Act, 1982*. The view in Alberta was that since the proposed amendment would affect only Alberta, this section made it possible for Parliament and the Alberta legislature to effect the change without involving other provinces. As it developed, this view was not shared by legal advisers to the federal government and, as a result, it was not possible to enlist federal support for the effort in time for the signing of the Accord.

In response to this problem Alberta recorded its commitment to pursue the goal of amending the *Alberta Act* by including in legislation,¹²³ passed under the Accord to amend its constitution, the clause

WHEREAS Her Majesty in right of Alberta has proposed the land so granted be protected by the Constitution of Canada, but until that happens it is proper that the land be protected by the constitution of the Province.

In keeping with that commitment the province proposed, as part of the package of constitutional changes, to include a suitable amendment to the *Alberta Act*. This proposal was accepted by the other participants.

PART 4 — CONTINUING WITHOUT CHARLOTTETOWN

Consequences of Losing Charlottetown

Charlottetown provided tools, not answers

The failure of the Charlottetown proposals was a significant setback for Métis leaders. Charlottetown resolved several basic issues and created a framework for resolving others. It recognized Métis self-government as an inherent right, characterized it as a third order of government, and provided a framework for fleshing out the jurisdictions, duties and rights of federal, provincial and Métis governments. Part of that framework, at least for MNA Métis, was a mechanism for defining Métis in at least one context. In short, instead of answers it provided tools for developing answers to the basic questions about the legal framework of jurisdiction, duties and rights affecting Métis as Aboriginal people *in a given context*.

The basic questions Charlottetown would have answered, or provided a means of answering, were as follows:

- Who is in the group? Who falls in the class of ‘Métis people’ for this purpose?
- Who has the power? Who can make the laws and decisions needed to develop and implement rules and programs in this context?
- What are the rights of the group, or group members? In this context, what rights are recognized by section 35?
- Who owes the duty? If a right produces a corresponding duty in this context, who owes it, and to whom?

Charlottetown is still useful as a model and a method

Without Charlottetown new tools must be found. The exactitude and adversarial context of the courts is inappropriate for the policy and framework development associated with answering these basic questions. Some more open and informal forum for discussion, consensus building,

and decision is required. Such a forum could operate in the more creative context of developing solutions rather than of enforcing rights. In a solution-driven environment, questions of jurisdiction, duties and rights are secondary. Their answers follow from the answers to the more basic question, what needs to be done? The Charlottetown Accord provided such an environment. Without it, or a similar commitment to negotiations, issues of jurisdiction, duties and rights will need to be addressed in specific situations if Métis people want to use the force of law to mandate action on specific problems. A cursory analysis of these issues shows that this will be a very difficult, expensive, and time-consuming task.

The tools to build a legal framework must be found in the Constitution, common law, statutes, and agreements. The Constitution is a source in so far as 91(24) provides a hint at jurisdiction and section 35 provides recognition of the Métis people and their existing Aboriginal and treaty rights. However, given the Charlottetown experience, framework issues — the components of the legal framework in a particular context — are unlikely to be resolved in the near future through constitutional amendments.

Similarly the common law is of limited utility. As discussed earlier there is not an abundance of supportive case law at present. Furthermore, it is unlikely that the narrow focus and adversarial nature of litigation will provide broad policy answers of the type required. That leaves statutes and agreements as the vehicles for clarifying framework issues.

The strength of the Charlottetown approach was that it provided recognition and a structure for creating context-specific legal frameworks by agreement. These self-government agreements provided contextual solutions to the Métis definition problem. In the agreement-based approach, defining Métis simply becomes part of developing the

agreement. If the agreement defines rights to be held by individuals or groups, the parties to the agreement will have to agree on who those beneficiaries are, or how they will be determined. Otherwise there will be no agreement.

The parties may agree to define the beneficiaries under the agreement as Métis for purposes of that agreement. That does not necessarily link the agreement to section 35 of the *Constitution Act, 1982*. The Métis of the agreement could be a subset, superset, or unrelated to the set of the Métis people of Canada found in section 35. In any case, the parties to the agreement will have to address the question, who is a Métis for purposes of this agreement? In that context it may be more productive to start with the more purposive approach of searching for consensus on what action is required and then turning to the identification of the objects of that action.

The Métis Nation Accord provides a conceptual example

A purposive approach was employed to develop the Métis Nation Accord¹²⁴ that accompanied the Charlottetown Accord. The Métis Nation Accord focused on the result of enabling Métis self-government and initiating discussions to provide a land base. To that end it defined a Métis Nation and provided a process by which groups within the Métis Nation could define their rights of self-government. The definition was structured as a core group, together with those accepted by the core group. The core group was linked via the Red River settlement or scrip entitlement to non-Indian Aboriginal people in control of land in western Canada prior to that area becoming part of Canada.

The Métis Nation included this core group of Métis and any person of Aboriginal ancestry accepted by the core group. There was no requirement that those added individuals be of mixed blood.

Consequently, a person who was a full-blooded 'Indian' — and correspondingly likely included in the section 35 class of Indian peoples of Canada — could be a member of the Métis Nation for purposes of defining the self-government rights of a group within the Métis Nation.

A purposive approach is also found in the Alberta legislation passed under the Alberta-Metis Settlements Accord. There Métis is defined as "a person of aboriginal ancestry who identifies with Metis history and culture".¹²⁵ This implicitly distinguishes the word 'Métis' applied to an individual and the same word applied to a history and culture. Since the history and culture belong to a people, the definition essentially adopts the undefined term 'Métis people' in the Canadian Constitution and, without defining it, uses it to define individual membership in a class for the purpose of the agreement.

The purpose of the agreement was to protect an existing land base, to provide the people living there with the power to govern it, and to ensure funds were available to seed development. The agreement, and the legislation subsequently passed under it, provide an example of using constitutional, common law, statutory, and contractual tools to develop a legal framework for Métis self-government in a particular context. That example is worth looking at in more detail.

The Alberta Example of Limited Métis Self-Government

The Alberta-Metis Settlements Accord

The Métis settlements of Alberta provide an example of a use of all four legal resources — the constitution (Alberta's), common law, statute, and agreement. Settlement areas in Alberta were reserved for Métis settlement associations beginning in 1939. In 1968 these associations and their members took legal action against the province to recover the proceeds from the sale of oil and gas found in the settlement areas. In

1989, after extensive negotiations, representatives of these associations and the provincial government signed the Alberta-Métis Settlements Accord, agreeing to a new land-holding and self-government scheme¹²⁶ for the settlements and providing a means of resolving the law suit. In 1990 the Alberta legislature passed four acts to implement the Accord. One of the acts — the *Constitution of Alberta Amendment Act, 1990* — amended Alberta's constitution to protect Métis lands. In short, Alberta and the settlements began with litigation, moved to an agreement, and implemented the agreement with statutes that included a constitutional component.

The statutes implementing the agreement assumed the provincial legislature had jurisdiction to make laws respecting Métis and lands reserved for the Métis. Although this provided immediate jurisdictional clarity for the Métis settlements, the clarity may not be permanent, since the assumption of jurisdiction has not been tested in the courts. It is entirely possible that the Supreme Court of Canada may eventually rule that Métis, as the term is defined for purposes of Alberta's *Metis Settlements Act*, fall within class 91(24) of the *Constitution Act, 1867*. In that case Parliament, and only Parliament, can make laws with respect to them and lands reserved for them. The framework provided by the provincial legislation would then fall unless constitutionally protected as a treaty or land claims agreement, or adopted by Parliament as its own legislation.

The Alberta Métis settlements package of legislation also provides some clarity with respect to duties and rights for the affected Métis. Under the package the province has a statutory duty to pay the settlements \$310 million over 17 years.¹²⁷ Métis settlement land areas are protected by the constitution of Alberta.¹²⁸ The Métis have basic self-government rights such as the right to elect local councils that can pass by-laws governing life in the settlement areas. These laws must be

consistent with relevant federal and provincial legislation, and with policies passed by the Metis Settlements General Council representing all the settlements. All Métis in Alberta have the right to apply for membership in a settlement and, once a member, to apply for land. Any person whose application for membership or land is rejected can appeal to an independent Metis Settlements Appeal Tribunal, most of whose members are Métis.¹²⁹

Land legislation clarified ownership, protection and resource management

The Accord settled disputes about who owned Métis settlement lands by agreeing that the settlements should be clear owners of the land in fee simple. Subsequent legislation implemented the Accord by issuing letters patent to the General Council to hold on behalf of all eight settlements. All the land within settlement boundaries was transferred, including the beds and shores of the rivers and lakes, the road allowances and the highways.¹³⁰ The Alberta legislature retained its law-making power over the areas, but title to the land itself went to the Métis. Mines and minerals were not transferred.

The *Metis Settlements Land Protection Act*¹³¹ was passed to protect the land from further loss. It provided that no part of the land could be taken unless the government, the General Council, and most of the people on the settlements agreed to the taking. To make sure that protection was not lost, the *Metis Settlements Land Protection Act* was in turn protected by the *Constitution of Alberta Amendment Act, 1990*.¹³² The original plan had been to protect it by amending the Constitution of Canada through an amendment to the *Alberta Act* under section 45 of the *Constitution Act, 1982*. When it became clear that there was little federal support for this approach, the settlements agreed

to the Alberta Constitution amendment approach, provided the province continued its efforts to have the Constitution of Canada amended.

The province did continue those efforts in the Charlottetown round. The constitutional amendment proposals of the Charlottetown Accord included an amendment to the *Alberta Act* that would have provided protection in Canada's Constitution similar to the protection provided by the *Constitution of Alberta Amendment Act, 1990*. With the defeat of Charlottetown, Alberta's commitment remains unfulfilled.

Under the Alberta-Metis Settlements Accord, the Crown transferred title to the surface of all lands in the settlement areas but maintained its claim to ownership of the mines and minerals. However, the province and the settlements agreed to co-manage the development of non-renewable resources. Under this agreement, made part of the *Metis Settlements Act*, no one can enter the settlement areas to explore for or develop non-renewable resources unless they have the approval of the settlement council and the General Council. That puts the Métis in a strong position to ensure that resource development will take place only if elected leaders consider it in the best interests of their communities.

The settlements began suing the Crown in right of Alberta for the money from the sale of oil and gas from the settlement areas on July 29, 1968. The first action was thrown out, reluctantly, by the courts because the settlements had not received the province's permission to sue it. A new action was filed on February 5, 1974. It was still in discovery in 1989 when the Accord was signed. Understandably, after more than 20 years of litigation without getting to trial, the settlements questioned the utility of the courts as a means of resolving disputes. The Accord included mutual commitments to the expeditious implementation of "a mutually acceptable process to conclude the litigation". The *Metis Settlements Accord Implementation Act* translated this into a freeze on

the litigation pending the protection of Métis settlement land in Canada's Constitution.

When the Accord was signed, neither the lawsuit nor the Accord claimed a basis in Aboriginal rights. Neither the province nor the settlements wanted to do anything in creating a legal framework for the settlements that might add to or detract from the Aboriginal rights of Métis or other Aboriginal groups. Consequently both parties agreed to leave it out of the discussion. In the settlements' view, the definition of Aboriginal rights was something that should involve the federal government, the province, and all Métis. Given the fact that the Charlottetown Accord included such an agreement, at least with regard to the Aboriginal right of self-government, the decision to leave this to another forum appears appropriate.

Powers of self-government are set out in the Metis Settlements Act

The *Metis Settlements Act* creates a framework for settlement government made up of settlement councils, a General Council representing all settlements, and an Appeal Tribunal.¹³³ The Act recognizes settlements as corporate entities and provides for their government by elected councils. The settlements have the powers of natural persons, with some qualifications, and settlement councils can make by-laws on local government and land-related matters. A unique feature of the legislation is that all by-laws must be approved at a general meeting of the members before becoming law.¹³⁴ In short, the Act does three things:

- It sets up or identifies the basic institutions that can make decisions affecting settlement government: settlement councils, the General Council, and the Appeal Tribunal.
- It says, with respect to settlement government, what each of the institutions can do and how they have to do it.
- It creates a body and procedures for resolving disputes.

The basic philosophy of the Act is that the settlement councils make the laws, but subject to constraining powers held by settlement members, the General Council, and the Appeal Tribunal.

The Act also provides for a General Council made up of the eight settlement councils.¹³⁵ The General Council has two basic functions: it holds the settlement land,¹³⁶ and it provides a forum for making rules on matters of concern to all settlements, especially the allocation of interests in land. These rules are called ‘policies’ and are binding on all settlement councils.¹³⁷ Policies must be made in consultation with the responsible minister and are subject to ministerial veto for a specified time after passage.¹³⁸ Most General Council policies require the consent of all settlements. Laws can also be made by ministerial regulation, but such regulations must be requested by the General Council.¹³⁹

Because it provides an ongoing role for a minister, the *Metis Settlements Act* cannot be said to constitute a form of self-government on the level of a third order of government as envisioned by Charlottetown. It should be emphasized, however, that the minister’s role is limited. Except in emergency situations, the minister cannot make regulations regarding the settlements except at the request of the General Council. The minister’s most significant power is the authority to veto General Council policies. That veto power must be exercised within 90 days of a policy’s passage, however, or the policy becomes effective as passed.

The other aspect of the Alberta-Metis accord most criticized from the Charlottetown perspective is the failure to provide for full ownership of the subsurface resources of the Metis settlement areas. The Métis Nation Accord included commitments from provincial governments, other than Alberta, to discuss resource ownership as part of the process in defining self-government and land base issues. Alberta

exempted itself from that commitment at the time but has since signed a memorandum of understanding with the Metis Settlements General Council committing itself to discussions respecting the transfer of ownership of subsurface resources.

Legislation provides for a form of Métis court to resolve disputes

Compared to most land claims agreements, the Alberta-Metis Settlements Accord was a bare skeleton. The intent of the Accord was not to establish the laws for self-government but to create a framework in which those laws could be developed. Consequently the Accord provided tools for developing a full body of Métis settlement law — both legislated and ‘judicial’. Métis legislated law can be created as settlement by-laws, as policies passed by the General Council, or as regulations made by the minister at General Council’s request. Métis ‘judicial’ law is possible in the form of decisions by the Metis Settlements Appeal Tribunal. This Tribunal is one of the most interesting components of the Accord package.

The Appeal Tribunal created by the *Metis Settlements Act*¹⁴⁰ has very broad powers to resolve disputes on the settlements. Although technically an administrative tribunal, its role in fleshing out the legislated framework makes it much more analogous to a Métis court. In addition to its jurisdiction to hear appeals from council decisions on matters of land¹⁴¹ and membership¹⁴² the Tribunal can, if parties agree, resolve disputes on a wide range of matters affecting life in the settlement areas.¹⁴³ In practice the Tribunal has already been called upon to resolve everything from builder’s lien problems to dispositions of estates. Most members of the Tribunal are from the settlements, and they bring to decisions a common sense and cultural perspective rooted in the experience of settlement living that would not be available in the

regular court system. As they make decisions, a body of Métis common law will develop that fleshes out the bare bones of the legislation.

A Statutory Option on the Charlottetown Model

Parliament could create a framework for deciding jurisdiction, duties and rights

Although defeated as a constitutional amendment, Charlottetown provides a useful starting point in dealing with the unfinished business left by its defeat. That is to design a mechanism for creating legal jurisdiction, duties, and rights frameworks in which Métis communities can exercise powers appropriate to their purposes. The key concept from Charlottetown was the recognition of the inherent right of self-government — the recognition that Aboriginal governments can be based on a grant of power from Aboriginal communities rather than on a delegation of power from Parliament or a provincial legislature.

Charlottetown made that explicit by recognizing Aboriginal governments as a third order of government under the Constitution. The purpose of this part of the paper is to explore another approach to this recognition within the reach of Parliament under Canada's existing Constitution.

What we are suggesting is one possible way to translate the fundamentals of the Charlottetown consensus into law. For simplicity we will refer to this as the 'recognition model'. It provides for the recognition in Canadian law of governance charters granted by Métis people and constituting Métis governments. It is one of many possible models that will no doubt come forward as the participants in Charlottetown wrestle with the new reality. It is not proposed as an alternative to constitutional amendment, but as an interim step toward that goal. In our view the work that went into Charlottetown need not be abandoned just because constitutional change is currently impossible.

The Charlottetown agreement put recognition of Aboriginal peoples' inherent right of self-government in the Constitution and provided, in a political accord, for implementation by agreements. The recognition model is an approach along similar lines. It would be based on an act of Parliament (the Recognition Act, for want of a better name) that

- recognizes the right of appropriate Métis groups to exercise rights of self-government, on or off a land base;
- defines the principles and protocols governing the recognition of self-government powers; and
- creates an independent entity with the capacity to ensure recognition if the principles and protocols are satisfied.

A Recognition Act could also make clear that it

- in no way affects existing Aboriginal, treaty and constitutional rights or future constitutional negotiations, and
- applies only to those Métis groups that wish to participate in the proposed scheme.

Such an act would enable groups of Métis to create governance charters establishing the rules by which they would govern themselves and providing that laws made in accordance with those charters would be recognized as laws of Canada.

The essential idea of a Recognition Act is that through it Her Majesty could say to a group of Métis people, "I recognize that you can empower your own government, and if you do so I will recognize its laws on the same footing as those made by the Parliament of Canada." That recognition would make available the entire enforcement apparatus of Canadian law. Given that, it would be politically unrealistic to expect Parliament to enable such recognition unless

- the laws recognized are not fundamentally at odds with certain basic principles of Canada, and
- procedural criteria had been followed that ensure that the people to be governed have granted the necessary authority.

The first principle is essentially what the Canada clause was about in the Charlottetown Accord. The key word in the second principle is 'procedural'. A Recognition Act would have to specify a mutually acceptable protocol that, if satisfied, would result in recognition. It could not be left to the government of Canada to determine at the end of the process whether recognition should be granted to specific self-governing institutions, or to specific laws of those institutions. In other words, such an act would have to make it clear that the only question to a group claiming governance powers would be, was the protocol of our recognition agreement satisfied?

The reason for this is clear. If there is to be recognition of the inherent right of self-government, it cannot be up to the government of Canada to convey legitimacy to an Aboriginal government — that legitimacy can come only from the people granting the government its authority. It is reasonable, however, for one government to insist that it will adopt as its own laws only those laws of another that satisfy certain agreed upon principles. Since that approach has already been accepted in the drafting of the Canada clause, it should not prove an insurmountable obstacle.

Implementing recognition

We are suggesting the concept of the recognition model simply as a starting point for discussion. The concept may be clearer, however, if we provide a few more details. First we should be clear that when we use the terms 'government' and 'laws' in this discussion we mean them in a very general sense of a system of decision-making bodies that govern the exercise and scope of their authority. A governance charter could be anything from a simple document empowering the representatives of a Métis community to manage social programs to a

full-blown constitution for a system of government on a Métis land base. In either case the governance charter would specify the basic purposes of the charter, the means of determining the group's leaders to accomplish those purposes, the rules governing the leaders' decision making, and the scope of authority granted to those leaders by the people to be governed. In other words, they would essentially be constitutions for Métis institutions granted by the governed.

Clearly it would not be possible to recognize the self-determined authority of every person claiming to represent a group on the basis of an inherent right of self-government. That means criteria would be needed to determine whether the person satisfies the criteria for recognition as a representative, and whether the members of the group ostensibly represented are, in fact, prepared to grant powers of the type asserted. These recognition questions would need to be answered by an independent body jointly established by the participants in the process — the Métis and the government of Canada. It cannot be determined by either party on its own whether the end result is to be recognition of each other's powers. To address this recognition problem, the proposed act would establish an independent joint council representing Parliament and the Métis to manage the recognition of self-governing powers. There would also need to be an independent appeal body capable of resolving disputes.

In its simplest form, a Recognition Act could provide for a three-stage process:

- *Recognition*
Any group of Métis could inform the council of a range of governance rights it wished to exercise. Those rights would be set out in a governance charter to be granted by those to be governed. Before discussing details of a suitable charter, the council would need to ensure that the group was really

representative of the people it claimed would grant the charter. The legislation could set out basic criteria and procedures for making this decision. If the group satisfied the criteria it would be recognized by the council for the purpose of developing an appropriate governance charter. The scope of the charter could be anything from a third order of government on a Métis land base to management of a Métis institution within a city.

- *Preparation*

Following procedures set out in the legislation, the council would work with the recognized group, affected government departments, and resource agencies (if necessary) to develop a suitable charter. Where possible, flexible, previously negotiated model charters could be used as starting points. Each charter would deal with all necessary land-related issues and required law-making authority. When all participants in the development process had agreed that a composite of rights, responsibilities, resources and rules constituted a viable unit, it would be considered a governance charter within the ambit of the Recognition Act. Consensus would also be required on the criteria for confirmation.

- *Confirmation*

When an appropriate governance charter had been prepared, it would be up to the people to be governed under it to confirm it as a grant of their authority. On that confirmation being obtained, the group would become a self-governing Métis institution owning, controlling, managing, and governing programs or land under the terms of the governance charter.

Laws made under that charter would be recognized as laws of Canada.

In addition, an independent body is needed that can resolve disputes arising during the recognition process.

An alternative to a Recognition Act would be to put the basic principles in a treaty between Canada and the Métis. This idea was proposed by a number of participants in the Charlottetown negotiations. The treaty could then be recognized and given effect by an act of Parliament.

Whatever legal mechanism is employed to give the arrangement effect, the basic document defining the relationship must provide

- *Recognition* — an acknowledgement that there can be governments in Canada whose powers are granted and determined by Aboriginal people, not Parliament or a provincial legislature;
- *Principles* — a statement of the principles of Canadian law an Aboriginal government will be expected to recognize in exchange for Canadian law recognizing the laws of the Aboriginal government;
- *Process* — a bipartisan or independent framework, with appeal provisions, for determining
 - representation — whether a group seeking recognition of its power to govern can negotiate on behalf of the governed;
 - compatibility — whether the proposed system of government, including the means by which the people represented will confirm the authority they grant and their desire for it to be recognized by Canadian law, fits within the mutual recognition principles set out in the *Recognition Act*¹⁴⁴ and
- *Resources* — to ensure that the government recognized has the capacity to secure the revenues needed to meet its recognized obligations.

As mentioned earlier, the first principle is the key principle of the Charlottetown Accord. The second is essentially the Canada clause

of that Accord. The third was embodied in certain ancillary accords on Aboriginal matters that were under negotiation at the time the overall Accord was announced. The fourth was addressed in the Métis Nation Accord and in the Alberta-Metis Settlements Accord. We have discussed the first and second principles in a very cursory fashion. The third and fourth principles require similar comment.

Any structure to enable the development of workable governance charters must recognize the time, money, and communication required. Our experience with the Métis settlements in Alberta is that the people to be governed are very careful about the powers they wish to grant to those governing. For example, a crucial component of the Métis settlements legislation is the condition that by-laws must be approved at a general meeting of settlement members. This essentially puts control of all basic settlement decisions, such as budget approval, in the hands of the membership at large. It became clear in the community meetings reviewing legislation drafts that such a constraint was essential to community support. Other communities may differ, but it is reasonable to assume that any process relying ultimately on a referendum of the governed for a grant of authority will require extensive community consultation. This is expensive and time-consuming. That should be recognized at the start if there is to be any realistic hope that the process will produce self-government. In simple terms, developing governance charters will take time and money.

Governing will also take money. There is no point in embarking on the process and raising the expectations of people in the communities if there is no assurance that the chartered governments will have enough money to meet their charter obligations. That money may come from members, land, economic activity, or contributions from other governments. Whatever the source, the need must be dealt with realistically by providing the authority to raise revenue in the charter

and by ensuring that any commitments from other governments are adequate to the task. These financing matters were still unresolved when the Charlottetown discussions ended. The best efforts draft on the ancillary Aboriginal Matters Accord noted the commitment of Aboriginal governments to promoting opportunities and providing public services. It went on to say

in the context of agreements relating to self-government, Parliament and the government of Canada, and the legislatures and the governments of the provinces and the assemblies and governments of the territories are committed to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist those governments:

- (i) to govern their own affairs, and;
- (ii) to meet the commitments referred to in paragraph (a) taking into account the levels of services provided to other Canadians in the vicinity and the fiscal capacity of an aboriginal government to raise revenues from its own sources.¹⁴⁵

There is no reason to think federal or provincial governments have changed the view expressed in this draft agreement that their commitment of resources may be based on the “capacity of an aboriginal government to raise revenues from its own sources”. Consequently, to be viable any constating charter must ensure the Aboriginal government has the capacity to raise such revenues. In this case ‘capacity’ means more than legal authority to extract money; it means also something to extract money from. For most Métis communities for the foreseeable future, the only realistic sources are land, resources, and other governments. The communities simply do not have the economic base to support the cost of basic community services. The funding approach most consistent with the concept of an inherent right of self-government is one based on land-related revenues. The assumption of a right of self-government implies land to be governed and a right to the revenue that land can produce. In our view, every effort should be made to enable that linkage, either in the foundational

treaty or the proposed Recognition Act, or in the constating charters of individual Aboriginal governments. Otherwise funding will be tied to transfers from other governments and the attendant susceptibility to suggestions of dependency — suggestions that damage both communities involved.

This part of the paper has provided a very sketchy outline of one option that would build on the effort that went into Charlottetown, rather than waiting for a new constitutional window to open. Our purpose is not to outline new legislation but to point out the need for creative thinking within the reality of Canada's current constitutional impasse. The situation of the Métis demands more than an excuse that Canadians won't accept constitutional change.

PART 5 — CONCLUSION

Eleven years after the adoption of the *Constitution Act, 1982*, the situation of the Métis peoples of Canada with regard to the recognition and protection of their Aboriginal entitlements is still uncertain. The least that can be said, however, is that there are now better opportunities available in the constitutional law of Canada for obtaining that recognition and protection than was the case prior to 1982.

Without a constitutional amendment stating definitively that the Métis are included within the term Indians in section 91(24) of the *Constitution Act, 1867*, there may be no resolution of this issue respecting all self-identifying Métis communities in Canada. Legal proceedings such as *Dumont* may resolve the issue for claimants in this action and those similarly situated, but such recognition may not extend to all groups of Canadian Métis for the reasons discussed above.

This will not be as significant as would have been the case prior to 1982, however. Section 35 of the *Constitution Act, 1982* now gives

Métis claimants throughout Canada the opportunity to establish Aboriginal entitlements, if they can bring themselves within the terms of the constitutional provisions. Some of the methods by which that might be done have been outlined in this paper.

The fundamental reality is that there are many Métis peoples in Canada. There is no uniform method for dealing with the protection of their collective identity as Aboriginal peoples. Differently situated communities will have to exploit different legal tools to address their particular situation. In this process, some communities will be better situated than others. But this is true for all Aboriginal peoples in Canada and is not unique to the Métis. At the very least, there is now some prospect that the Métis will no longer be the forgotten Aboriginal people.

NOTES

1. The Charlottetown Accord was signed August 28, 1992. References in this paper are to the Draft Legal Text to the Accord published on October 9, 1992.
2. Throughout this paper, when we use the term 'law' we are referring only to law currently recognized and enforceable by the Canadian legal system. Some First Nations and other Aboriginal groups have their own bodies of law and enforcement mechanisms. Some of these have been, or are being, codified. Over time these may become recognized in Canadian law. However, we cannot claim expertise in these other legal systems and consequently have not considered them in this paper.
3. *Constitution Act, 1867* (U.K.), 30 and 31 Vict., c.3.
4. The terms 'Metis' and 'Métis' are used in this paper without any significance being attached to the distinction.
5. *Metis Settlements Act*, c.M-14.3, S.A. 1990, s.1(j).
6. *Fisheries Act* Regulation SOR/87-153, *Alberta Fishery Regulation*. s.2(1).

7. *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11.
8. *R. v. Sparrow*, [1990] 3 C.N.L.R. 160.
9. See Paul Chartrand, "Aboriginal Rights: The Dispossession of the Metis" (1991) 29 *Osgoode Hall L.J.*, 457 at 460-461; Catherine Bell, "Who are the Metis People in Section 35(2)" (1991) 29 *Alta L.R.*, 351 at 359; B.W. Morse and R.K. Groves, "Canada's Forgotten Peoples: The Aboriginal Rights of Metis and Non-status Indians" (1987) 2 *Law and Anthropology*, 139 at 143 -145.
10. S.C. 1870, c.3.
11. Chartrand, *supra*, note 9, at 462; Bell, *supra*, note 9, at 359-360.
12. *Supra*, note 10, s.31.
13. First enacted S.C. 1872, c.23. There were a number of subsequent enactments.
14. S.C. 1879-81, c.31.
15. D. Sanders, "Aboriginal Peoples and the Constitution" (1981, 19 *Alta. L.R.*, 410 at 419-420, as quoted in W. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatoon: Native Law Centre, University of Saskatoon, 1987), at 96.
16. Pentney, *ibid.*, at 97.
17. Bell, *supra*, note 9, at 375-376.
18. Morse and Groves, *supra*, note 9, at 143-146.
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. Bell, *supra*, note 9, at 353.
23. R.S.A. 1970, c.233, s.2(a).
24. *Supra*, note 5.

25. *Supra*, note 6.
26. See Clem Chartier, *In the Best Interest of the Metis Child* (Saskatoon: Native Law Centre, University of Saskatchewan, 1988), c.3.
27. Metis National Council, *The Metis: A Western Canadian Phenomenon*, quoted in Chartier, *ibid.*, at 36-37.
28. R.E. Gaffney, G.P. Gould and A.J. Sample, *Broken Promises: The Aboriginal Constitutional Conferences* (Fredericton: New Brunswick Association of Metis and Non-Status Indians, 1984), quoted in Chartier, *ibid.*, at 23 - 24. See also M. Dunn, *Access to Survival: A Perspective on Aboriginal Self-Government for the Constituency of the Native Council of Canada* (Kingston: Institute of Intergovernmental Relations, 1986), at 4-5.
29. S.C. 1868, c.42.
30. R.S.C. 1985, c.I-5, s.2(a).
31. *Ibid.*, s.2(a).
32. [1939] S.C.R. 104.
33. R.S., c.S-19.
34. *Ibid.*, at 105.
35. Now the *Constitution Act, 1867*.
36. *Supra*, note 32, at 108.
37. *Ibid.*, at 115.
38. *Ibid.*, at 118.
39. *Ibid.*, at 119.
40. "Indians: An Analysis of the Term They Used in S. 91(24) of the British North America Act, 1867" (1978-1979) 43 *Saskatchewan L.R.*, 39.
41. Kingston: Institute for Intergovernmental Relations, 1986.
42. See the discussion in c.17, esp. at 217.

43. *Supra*, note 41, at 218-220.
44. T. Flanagan, "The Case Against Metis Aboriginal Rights" (1983) 9 *Canadian Public Policy*, 314; *Metis Lands in Manitoba* (Calgary: University of Calgary Press, 1991).
45. Flanagan, "The Case Against Metis Aboriginal Rights", at 322.
46. *Ibid.*, at 318.
47. [1982] 3 C.N.L.R. 122 at 131.
48. [1982] 3 C.N.L.R. 95.
49. *Constitution Act, 1930*.
50. *R. v. Ferguson* (5 March 1993) Peace River C0280204050A01/A02 (Alta Prov. Ct); (24 September 1993) Peace River App. 9209005-S5-0101,9309005-S5-0102 (Alta Q.B.).
51. See the discussion in Schwartz, *supra*, note 41, at 184-185.
52. See *ibid.*, as well as the discussion in Chartier, *supra*, note 26, c.3.
53. *Metisism: A Canadian Identity* (Edmonton: Alberta Federation of Metis Settlement Associations, 1982), at 17.
54. *Ibid.*, at 19.
55. Chartier, *supra*, note 40, at 64-65.
56. Schwartz, *supra*, note 41, at 228.
57. Flanagan, "The Case Against Metis Aboriginal Rights", *supra*, note 44, at 324.
58. Pentney, *supra*, note 15, c.4.
59. *Ibid.*, at 84.
60. *Ibid.*, at 88.
61. *Ibid.*
62. *Ibid.*, at 95-100.
63. *Ibid.*, at 97-98.

64. *Ibid.*, at 100.
65. See Bell, *supra*, note 9; "Metis Aboriginal Title", LL.M. Thesis, Faculty of Law, U.B.C., 1989, c.2; "Metis Rights", unpublished.
66. Bell, *supra*, note 9, at 379.
67. Bell, "Métis Aboriginal Title", *supra*, note 65, at 82.
68. *Supra*, note 32.
69. "Understanding Aboriginal Rights" (1987) 66 C.B.R., 727 at 757.
70. *Ibid.*
71. *Supra*, note 8, at 178.
72. *Ibid.*, at 179.
73. *Ibid.*, at 180.
74. *Supra*, note 1.
75. See Schwartz, *supra*, note 41, at 187-188; Bell, "Metis Aboriginal Title", *supra*, note 65, at 82; Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992), at 27-4.
76. Subnom. *Manitoba Metis Federation v. Attorney General of Canada*, [1987] 2 C.N.L.R. 85 (Man. Q.B.), rev'd on appeal [1988] 3 C.N.L.R. 39 (Man. C.A.), rev'd on appeal [1990] 2 C.N.L.R. 19 (S.C.C.). The litigation is now proceeding.
77. *Supra*, note 10. There are many analyses of these provisions in the scholarly literature. As examples, see Paul Chartrand, *Manitoba Metis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, University of Saskatchewan, 1991); Flanagan, *Metis Lands in Manitoba*, *supra*, note 44; D.N. Sprague, *Canada and the Metis: 1869-1885* (Waterloo: Wilfrid Laurier University Press, 1988), esp. c.4-7; "Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887" (1980) 10 *Manitoba L.J.*, 415.
78. Amended Statement of Claim, February 18, 1987, at paragraphs 9, 10, 10A.
79. *Ibid.*, paragraph 13.

80. *Ibid.*, paragraphs 11, 14.
81. *Ibid.*, paragraph 12.
82. *Dumont et al. v. Her Majesty the Queen*, Statement of Claim, May 12, 1986.
83. *Ibid.*, paragraph 10.
84. *Ibid.*, paragraph 21.
85. [1985] 1 C.N.L.R. 120.
86. *Supra*, note 8, at 180.
87. *Ibid.*
88. *Ibid.*
89. *Manitoba Metis Settlement Scheme of 1870*, *supra*, note 77; "Aboriginal Rights: The Dispossession of the Metis", *supra*, note 9.
90. Factum of Native Council of Canada, *Dumont et al. v. Attorney-General of Canada*, November 1, 1989 (S.C.C.), paragraphs 28 - 29.
91. *Manitoba Metis Federation Inc. v. Attorney-General of Canada*, [1988] 3 C.N.L.R. 39 at 49 (Man. C.A.).
92. Chartrand, "Aboriginal Rights", *supra*, note 9, at 479-480.
93. *Supra*, note 91.
94. *Ibid.*
95. *Manitoba Metis Federation v. Attorney General of Canada*, [1990] 2 C.N.L.R. 19 (S.C.C.).
96. D. Sanders, "Getting Back to Rights", in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Montreal: Institute for Research on Public Policy, 1992), 261 at 282.
97. For a recent judicial decision that holds that the application to Métis of hunting restrictions contained in a provincial wildlife act is a violation of their constitutional entitlements as Métis people

under section 35 of the *Constitution Act, 1982*, see *R. v. McPherson*, [1993] 1 W.W.R. 415 (Man. Prov. Ct.). This decision is currently under appeal.

98. [1979] 3 C.N.L.R. 17 (F.C.T.D.).
99. *Ibid.*, at 45.
100. See Slattery, *supra*, note 69, at 759-760.
101. (1991), 79 D.L.R. (4th) 185 at 420-421 (B.C.S.C.). See as well the decision of the British Columbia Court of Appeal in this case, 104 D.L.R. (4th) 470 at 512-514 (per MacFarlane J.A., Taggart J.A. concurring) and at 575-577 (per Wallace J.A.). At the time of writing, application for leave to appeal this decision is pending before the Supreme Court of Canada. It should be noted that the *Baker Lake* test has never been considered by the Supreme Court of Canada.
102. The subsection states that "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired".
103. *Supra*, note 8, at 169-170.
104. See *Outstanding Business: A Native Claims Policy* (Ottawa: Supply and Services Canada, 1982).
105. See *Comprehensive Land Claims Policy* (Ottawa: Supply and Services Canada, 1986).
106. Comprehensive Land Claim Agreement Between Canada and the Dene Nation and the Metis Association of the Northwest Territories, April 9, 1990.
107. *Ibid.*, c.21.
108. *Ibid.*, c.8.
109. *Ibid.*, c.10.
110. *Ibid.*, c.13.
111. *Ibid.*, c.28-31.
112. *Ibid.*, c.7.

113. With suitable modifications to recognize subordinate provincial jurisdiction in Alberta.
114. Charlottetown Accord, *supra*, note 1.
115. *Ibid.*, at 14.
116. *Ibid.*, at 24.
117. *Ibid.*, at 37-41.
118. A draft version of a Metis Nation Accord, dated October 3, 1992, was included with a package of draft legal text materials accompanying the Charlottetown Accord. It is not known to what extent this draft was agreed to by federal and provincial governments, or whether there were subsequent drafts on which there was agreement.
119. *Ibid.* This definition was continuously being reviewed and revised by the MNC during the Charlottetown process. This may not be the last definition adopted during that process by the MNC.
120. *Ibid.*, s.1(b).
121. *Ibid.*, s.4.
122. Alberta-Metis Settlements Accord, entered into by the Province of Alberta and the Alberta Federation of Metis Settlement Associations, July 1, 1989.
123. *Constitution of Alberta Amendment Act, 1990*, S.A. 1990, c.C-22.2.
124. *Supra*, note 118.
125. *Metis Settlements Act*, *supra*, note 5, s.1(j).
126. The scheme is not full self-government as would have been possible under the Charlottetown Accord. It assumes provincial jurisdiction and provides a minister of the Crown with certain supervisory powers in areas of financial administration and law making.
127. *Metis Settlements Accord Implementation Act*, S.A. 1990, c.M-14.5, Part 1.
128. *Supra*, note 123, s.3, 4, 5.

129. These provisions are in the *Metis Settlements Act*. See as well "Metis Settlements General Council Land Policy", *Alberta Gazette*, July 31, 1992, at 2592.
130. These provisions are included in the letters patent.
131. S.A. 1990, c.M-14.8.
132. *Supra*, note 123, s.4, 5.
133. *Supra*, note 5, Parts 1-2 (settlement council powers); Part 8 (establishment of Metis Settlements General Council); Part 7 (Metis Settlements Appeal Tribunal).
134. *Ibid.*, s.55.
135. *Ibid.*, Part 8, Division 1.
136. *Ibid.*, s.2.
137. *Ibid.*, ss.222-223.
138. *Ibid.*, ss.222, 223, 224.
139. *Ibid.*, Part 10.
140. *Ibid.*, Part 7.
141. *Ibid.*, s.184(2).
142. *Ibid.*, s.184(3).
143. *Ibid.*, s.189.
144. These could be along the lines of the Canada clause of the Charlottetown Accord.
145. Clause 3.1 of the October 7, 1992, 10:00 a.m. Best Efforts Draft Accord Relating to Aboriginal Constitutional Matters. Newfoundland did not agree with this clause.

IMPLEMENTING ABORIGINAL SELF-GOVERNMENT: CONSTITUTIONAL AND JURISDICTIONAL ISSUES

by Peter W. Hogg and Mary Ellen Turpel

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EXECUTIVE SUMMARY

The purpose of this paper is to make suggestions about how Aboriginal self-government could be implemented without any amendment of the Constitution of Canada. The authors suggest that elements of the Charlottetown Constitutional Accord could be included in a political accord or accords, which could become the framework for self-government negotiations. The authors discuss the nature of the powers that could be included in a self-government agreement, making extensive reference to the Yukon First Nation Self-Government Agreements. The issues that are examined include personal and territorial jurisdictions, concurrent and exclusive powers, the relationship of Aboriginal laws to federal and provincial (or territorial) laws, the administration of justice, and the financing of self-government. The authors recommend that self-government agreements should be constitutionally protected, and they explain how that can be accomplished under the existing Constitution. The applicability of the *Canadian Charter of Rights and Freedoms* is also discussed, and a recommendation made for the development of Aboriginal constitutions, which could include Aboriginal charters of rights.

IMPLEMENTING ABORIGINAL SELF-GOVERNMENT: CONSTITUTIONAL AND JURISDICTIONAL ISSUES

BY PETER W. HOGG AND MARY ELLEN TURPEL

INTRODUCTION

Post-Charlottetown Accord Context

Since the defeat of the Charlottetown Accord in October 1992, there has been uncertainty about the future of Aboriginal self-government and particularly the implementation of the Aboriginal part of the proposed constitutional amendments. It seems evident that large-scale constitutional reform is not on the national political agenda in the wake of the 'no' vote. While many negotiations are under way between various Aboriginal peoples¹ and Canadian governments on issues ranging from criminal justice to land claims, the basis of these discussions and the shape of any agreements produced as a result of them, especially in terms of constitutional recognition or protection of rights, is not clear. Aboriginal peoples have repeatedly expressed their frustration with the premises, scope and the pace of the negotiations now under way, and the limited progress suggests that a fundamental rethinking of government policy and practice is in order.

The Royal Commission on Aboriginal Peoples' 1993 discussion paper, *Partners in Confederation*,² provided some helpful clarification of the source of self-government and some ideas for progressing with implementation of the right of self-government. Moreover, the 1993 election of a Liberal majority federal government, whose policy agenda includes the commitment to recognize the inherent right to self-government and implement it without re-opening constitutional

discussions, suggests that a new political climate exists for progress on self-government issues.³

The purpose of this paper is to explore the extent to which progress can be made immediately, within the existing Constitution of Canada, on implementing the inherent right of self-government. We do not consider arguments outside the Constitution of Canada in this paper, although we acknowledge that full political consideration of self-government would involve exploring such arguments.⁴ In particular, we want to analyze the legal and constitutional issues involved in implementing the inherent right without the express constitutional amendments proposed in the Charlottetown Accord. These include the articulation of Aboriginal governmental jurisdictions in light of existing federal and provincial laws of general application; the financing of self-government; the constitutional status of self-government agreements; the resolution of disputes over inconsistent (Aboriginal and federal or provincial) laws; and the application of the *Canadian Charter of Rights and Freedoms* to Aboriginal governments.

Inherent Source of Aboriginal Right of Self-Government

The Charlottetown Accord expressly recognized an "inherent" right of Aboriginal self-government.⁵ This is important from both a political and a legal perspective. The right of self-government was understood by all participants in the Charlottetown negotiations to be a pre-existing right that is rooted in Aboriginal peoples' long occupation and government of this land before to European settlement. This is not a new concept for Canadian constitutional law. Although Canadian courts have not explicitly recognized the inherent right of self-government (because they have not yet been faced squarely with the issue), the courts have recognized other Aboriginal rights. The Supreme Court of

Canada has expressly accepted that these rights derive from the fact that Aboriginal peoples have existed in Canada for a very long time and have exercised rights that must be respected by those who are more recent immigrants.⁶ As Professor Brian Slattery has shown, Aboriginal rights are rights that are held by Aboriginal peoples, not by virtue of Crown grant, legislation or treaty, but "by reason of the fact that aboriginal peoples were once independent, self-governing entities in possession of most of the lands now making up Canada".⁷ This logic supports the fact that the rights that Aboriginal peoples enjoy in Canadian law are inherent in their own history and experience as First Peoples. Many treaties concluded between Aboriginal peoples and the Crown also demonstrate that Aboriginal peoples exercised their rights of self-government by structuring their relations with governments in Canada on the basis of consent and mutual recognition.

The inherent nature of the right of self-government does not provide the answer to the questions of what the right means today, and how it can be related to the existing constitutional and political structure of Canada. Uncertainties on these issues make high-level political discussions on what Aboriginal self-government means in a contemporary political context essential, because at present the issues are wide open to judicial interpretation if left to the courts, and indeed they are not really suitable for resolution by courts.⁸ It is in the best interests of both governments and Aboriginal peoples to explore options short of constitutional amendment (although constitutional amendment would be the preferred approach).⁹ What other approaches are there, and how would they be viewed from a constitutional law standpoint? Answering this question is the purpose of our paper: we want to explore ways to move ahead on Aboriginal self-government in a peaceful and constitutionally viable fashion. Several options and approaches to the issue of jurisdiction, status of agreements and justiciability are explored

in the pages to follow. The political feasibility of the ideas developed herein is for elected officials to evaluate; we are simply trying to suggest what is legally possible under the present Constitution.

Scope of Aboriginal Government Jurisdiction

The Charlottetown Accord provided a mechanism for defining the scope of self-government rights for particular Aboriginal peoples. It also implied that Aboriginal governments would be equivalent in status to the existing two orders of government in Canada by describing Aboriginal governments as one of three orders of government;¹⁰ in other words, Aboriginal governments were to be seen as sovereign in their own spheres. The Accord was not specific on many important points: it called for (in another draft accord) a process to work out problems that could arise in negotiations and jurisdictional conflicts. It also provided for a gradual transition to self-government based on negotiated agreements, delay in justiciability of the inherent right, and rules for dealing with inconsistent laws. It is fair to say that, while the recognition of an inherent right of self-government was an important feature of the Charlottetown Accord, what was far more significant, from a practical perspective, was the method proposed to invigorate the right. Although the negotiation of self-government agreements has been on the national agenda since the early 1980s, the Accord would have established for the first time a firm legal and policy framework to govern negotiations, to resolve preliminary issues such as identification of parties, to clarify the scope of Aboriginal jurisdiction,¹¹ to ensure adequate funding for the process and for the resulting governments, and to provide for the constitutionalization of the self-government agreements and for their implementation. In our view, this comprehensive structure, which was agreed to by all governments, was

the truly innovative feature of the Accord. This innovation can be built upon in fashioning a new path for the implementation of self-government.

The provisions of the Charlottetown Accord are critical, because the conventional body of constitutional law in Canada is not easily squared with the inherent right of Aboriginal self-government. There are many notions in constitutional law, some quite foundational, that are inconsistent with the recognition of Aboriginal self-government. Principal among these is the doctrine of exhaustiveness, which suggests that all available jurisdiction in Canada is currently divided between the federal and provincial governments by sections 91 and 92 (and the other jurisdictional provisions) of the *Constitution Act, 1867*.¹² This doctrine appears to leave no room for Aboriginal self-government except as a delegated government under the federal or provincial division of legislative and administrative responsibility. Of course, the doctrine of exhaustiveness was developed without regard for the Aboriginal reality in Canada and, as the Royal Commission on Aboriginal Peoples has suggested, the doctrine of exhaustiveness may concern the scope of jurisdiction and not the exclusiveness of jurisdiction.¹³ Moreover, the doctrine developed in the context of federal-provincial jurisdictional disputes in which Aboriginal peoples played no role.

The doctrine of exhaustiveness was also developed before section 35 of the *Constitution Act, 1982* was introduced into the Canadian Constitution to give more explicit constitutional protection to Aboriginal and treaty rights. It is an important task of constitutional lawyers and elected officials to review those doctrines that reflect the Eurocentric bias of Canadian constitutional law and government, like the doctrine of exhaustiveness, and embark on the reordering of institutions and doctrine that is required to give full expression to the long-standing Aboriginal presence in Canada. This review will become more urgent as

the implementation of self-government progresses. However, suffice it to say here that the doctrine of exhaustiveness should not be an obstacle in the way of articulating Aboriginal government jurisdiction. It is a matter that requires discussion, but it is not fatal to the implementation of self-government within the existing constitutional framework.

EXPRESSING ABORIGINAL SELF-GOVERNMENT JURISDICTION

Contextual Statement

Beyond the recognition of an inherent right of self-government, for which there is a considerable political and legal consensus, the implementation of the right in the particular context of an Aboriginal people is a more complex legal challenge. There are different Aboriginal peoples with diverse government traditions, territories and aspirations. A flexible and creative approach is required to respond to these various situations. The Charlottetown Accord provided for a flexible method of expressing the scope of Aboriginal jurisdiction that is worth examining closely, because it is a helpful middle ground between two extremes. At one extreme is the simple recognition of the inherent right without any guiding framework for implementation. This approach is broad and vague enough to respond to the diverse situations and aspirations of Aboriginal peoples, but its very breadth and vagueness makes concrete implementation more difficult. At the other extreme is a detailed blueprint for self-government that would apply to all Aboriginal governments without regard for their differing situations, cultures and aspirations.

The Charlottetown Accord proposed a middle ground between these two approaches. It proposed that a 'contextual statement' should form part of the Aboriginal self-government package of constitutional amendments. The idea of the contextual statement was to frame self-

government jurisdiction in light of the purposes and objectives that should be served by the inherent right. It was designed to be flexible enough to accommodate different circumstances and conditions, yet detailed enough to indicate the general scope of self-government. The text of the proposed contextual statement is worth recalling in full, although we note that no final legal text was ratified:

The exercise of the right of self-government includes the authority of the duly constituted legislative bodies of Aboriginal peoples, each within its own jurisdiction:¹⁴

(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and,

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment

so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies.¹⁵

The contextual statement describes the purposes of self-government and the general functions of Aboriginal legislative bodies. Since this statement has been agreed to by governments and Aboriginal organizations, it should continue to be relevant in setting the general purpose or context for self-government negotiations. The statement emphasizes the authority of Aboriginal governments to enact and enforce laws that will enable Aboriginal peoples to control their own development as peoples, to set their own priorities in order to ensure the development of their members, and especially to protect their lands, languages and cultures.

One issue that is not mentioned explicitly in the contextual statement is the objective of self-government implementation for those Aboriginal peoples with treaties. Many First Nations leaders speak of 'treaty government' and suggest that their treaties are an effective vehicle for implementing the inherent right of self-government.

Confusion over the relationship between treaties and the package of self-government amendments in the Charlottetown Accord was a source of dissension during the debate over the Accord in Aboriginal communities. Some clarification on this point is certainly required. As the President of the Union of Nova Scotia Indians suggested to the Royal Commission on Aboriginal Peoples,

We see our right of self-government as an inherent right which does not come from other governments. It does not originate in our Treaties. The right of self-government and self-determination comes from the Mi'kmaq people — it is through their authority that we govern. The Treaties reflect the Crown's recognition that we were, and would remain, self-governing, but they did not create our Nationhood... In this light, the treaties should be effective vehicles for the implementation of our constitutionally-protected right to exercise jurisdiction and authority as governments. Self-government can start with a process of interpreting and fully implementing the 1752 Treaty, to build on it to an understanding of the political relationship between the Mi'kmaq people and the Crown.¹⁶

Treaty implementation was dealt with in a separate section of the Charlottetown Accord,¹⁷ although the relationship between treaty implementation and self-government implementation was not clearly linked. For some Aboriginal peoples, the implementation of the inherent right of self-government is inseparably linked to the fulfilment of a pre-existing treaty relationship.

We would suggest that a new version of the contextual statement, which could be used as part of a framework for implementing the inherent right, should reflect the central role of treaties and treaty-based government for Treaty First Nations. This could be accomplished by adding to the concluding language of the contextual statement some additional language such as the following:

...and recognizing that for Treaty First Nations the implementation of self-government will mean the articulation of

rights and responsibilities flowing from existing treaties, which should be fully honoured and implemented by Canadian governments as a central part of self-government implementation.

The text of the contextual statement contemplates that the "duly constituted legislative bodies" can act to achieve certain aims and objectives. The requirement of duly constituted legislative bodies would require the Aboriginal people in question to develop a constitution with provision for a law-making body and demonstrated support among the people for this institution.¹⁸ While it is presumed that such a constitution would be written, it could also take another form more consistent with Aboriginal customs and traditions if so desired by the particular Aboriginal people. For example, in the Iroquoian nation, wampum belts may be used to articulate the constitution and the respective responsibilities of legislative and other government bodies. Certainly some flexibility is required on this point, although it is probable that most constitutions would also be written.

The aims that the Aboriginal legislative body would pursue are defined by the contextual statement in subsections (a) and (b), and especially in the concluding clause, where the overall objective is that of determining and controlling the particular people's development according to their own values and priorities and in order to ensure the integrity of their society. This statement marks a dramatic break with the status quo of delegated and limited power under the *Indian Act* or other statutory schemes to which Aboriginal peoples are subject. The statement confirms the universal view that the *Indian Act* must be abandoned in favour of a new relationship based on the notion of internal self-determination.

It was never imagined that the contextual statement would settle the question of exactly what powers an Aboriginal government does or should possess, or that it would resolve the inevitable conflicts between

Aboriginal laws and other laws. What the clause would do — and this is its enduring appeal — is to offer a broader prism through which to view the discussions on self-government between individual Aboriginal communities and governments that would resolve matters of jurisdiction. It is the foundation upon which a list of powers can be developed by a particular Aboriginal people and an agreement negotiated with government to clarify jurisdiction and even fiscal responsibility.

Options for a New Contextual Statement

Because of the failure of the Charlottetown Accord, the contextual statement did not make its way into the Constitution, and it is only realistic to recognize that constitutional amendments on self-government are unlikely in the near future. Nonetheless, language close to the contextual statement could still provide the framework for progress on the development of self-government institutions. For example, there is nothing to prevent Aboriginal organizations and the federal and provincial governments from entering into a political accord or accords on a framework for implementing the inherent right of self-government.

In addition to the option of a political accord, Aboriginal peoples and governments may want to explore the option of federal legislation to provide such a framework. Provided such legislation is the product of consent on the part of the Aboriginal peoples and their representatives, this option would enable the development of specific political accords with Aboriginal people and allow for flexibility in accommodating differences in the circumstances and priorities of Aboriginal peoples. One advantage of legislation is that it would be cost-efficient and expeditious rather than negotiating separate political accords on all framework issues with each Aboriginal people concerned. The

legislation could establish basic principles that could then be particularized in specific accords.

Through either political accords or legislation, a reworked contextual statement could form a central component of a framework for implementing the right of self-government. We would suggest the following text for inclusion in a political accord or legislation:

The exercise of the right of self-government includes the authority of the duly constituted legislative bodies of Aboriginal peoples

(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and
(b) to develop, maintain and strengthen their relationship with their lands, waters and environment

so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies and recognizing that for Treaty First Nations the implementation of self-government will require the articulation of rights and responsibilities flowing from existing treaties, which should be fully honoured and implemented by Canadian governments.

Process for Negotiating Agreements

The goal of a political accord or other framework for implementing the inherent right of self-government has to be the conclusion of negotiated agreements with particular First Nations, Inuit and Métis peoples on self-government jurisdiction, financing, and dispute resolution. We have a strong preference for a revived political framework leading to negotiated agreements. The alternative of inaction by governments would lead to unilateral initiatives by Aboriginal peoples, which would give rise to endless legal disputes, the resolution of which would be highly unpredictable.¹⁹ In our view, an agreed-upon contextual statement would help to facilitate self-government agreements, because it would provide the objectives of self-government that should guide the process of negotiations as well as the content of any agreement.

Any self-government agreement between a specific Aboriginal community and government(s) will of necessity include a list or lists of different heads of powers under which the Aboriginal government would have the discretion to legislate. Moreover, any such list of powers should relate back to the contextual statement and be interpreted in light of its expression of objectives, in order to facilitate the proper implementation of the right of self-government. The contextual statement would not be the only guide to the development of heads of legislative power or the only interpretative aid. In the case of Treaty First Nations, for example, there may be treaty rights that would carry with them some jurisdictional responsibility.²⁰ Modern land claims agreements will also contain powers of management of the lands and resources belonging to an Aboriginal people.

SCOPE OF ABORIGINAL JURISDICTION

In this paper, we make frequent reference to the Yukon Indian self-government agreements.²¹ The Yukon agreements are helpful for the analysis here because they illustrate the kind of progress that is possible within the existing constitutional framework as well as the need for reconsideration of certain government policies and approaches that impede the implementation of self-government.²² To understand those agreements, some background is necessary.

The Council for Yukon Indians, which represents the 14 First Nations in the Yukon, has entered into an Umbrella Final Agreement with the governments of Canada and the Yukon.²³ This agreement contains the basic terms of the Yukon land claims settlement, but it is not a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982*, and it is not legally effective unless and until its provisions are incorporated into a final agreement entered into by a

Yukon First Nation. Four First Nations have entered into final agreements that incorporate all the terms of the Umbrella Final Agreement and also contain provisions specific to the First Nation. These four final agreements are land claims agreements within the meaning of section 35.

The Umbrella Final Agreement, and therefore all four First Nation final agreements, contemplated the negotiation of self-government agreements by the Yukon First Nations. However, at the insistence of the government of Canada, the Umbrella Final Agreement and the four First Nation final agreements provided, by paragraph 24.12.1, that self-government agreements would not create treaty rights within section 35 of the *Constitution Act, 1982*. The four Yukon First Nations that have entered into First Nation final agreements have also entered into self-government agreements. The self-government agreements are very similar to each other, being based on a model agreement negotiated by the Council for Yukon Indians in 1992. The four agreements are to be given effect by self-government legislation, to be enacted by the Parliament of Canada and the Yukon Territorial Assembly. That legislation has now been enacted.²⁴

The jurisdictional provisions of one of the Yukon Indian self-government agreements are reproduced in Appendix 1, and we will refer to those provisions from time to time. The jurisdictional provisions are set out in four lists of powers to enact laws. The first list (in paragraph 13.1) is a list of law-making powers that are exclusive to the First Nation. (The other law-making powers are concurrent. The terms exclusive and concurrent are explained later in this paper.) The second list (in paragraph 13.2) is a list of law-making powers that extend throughout the Yukon but are limited to First Nation citizens. This is an example of personal jurisdiction, which is explained later in this paper. The third list (in paragraph 13.3) is a list of law-making powers that are

restricted to the First Nation's own land; the powers apply to everyone on the land, not just First Nation citizens. This is an example of territorial jurisdiction, which is also explained later. The fourth list of powers (in paragraph 13.4) is a list of emergency powers that confer on the First Nation certain special powers to cope with emergencies on First Nations land.

We recognize that the details of self-government will differ radically from one part of Canada to another. Solutions that work well in the sparsely populated Yukon may not work in the South. However, the Yukon agreements do provide examples of the kinds of jurisdiction that an Aboriginal government may wish to exercise. It should be emphasized, however, that it is not coincidental that the Yukon self-government agreements were concluded shortly after an agreement on a comprehensive land claims settlement. For Aboriginal peoples, the issue of land is central to self-government jurisdiction. This paper does not focus on those connections, although it is important to emphasize that as part of the implementation of self-government, lands and resources issues will be pivotal to effective government. The existing land and resource base for most First Nations is inadequate for effective self-government, and this item will require immediate attention in the transition away from the *Indian Act* to self-government.

Territorial Jurisdiction

One issue that must be addressed in any self-government agreement is the extent of a First Nation's power to make laws. One model is a list of powers that are confined to the territory of the First Nation. It is obvious that every First Nation would require extensive powers over its own land. The management of the land, the regulation of activity on the land, including hunting, fishing, gathering, mining and forestry, the

licensing of businesses, planning, zoning and building codes, environmental protection, and the administration of justice are among the subjects that a First Nation would probably wish to regulate on its own land. These kinds of powers would likely be confined to the First Nation's land.²⁵ The powers would not extend to Aboriginal people off First Nation land. However, the powers would apply to both non-Aboriginal and Aboriginal people on First Nation land.

In the Yukon First Nation self-government agreements,²⁶ where there are four lists of powers, one list (in paragraph 13.3) is confined to the First Nation's settlement land. These powers are examples of territorial jurisdiction.

Personal Jurisdiction

There are other powers that a First Nation might wish to exercise that should not be confined to First Nation land. The First Nation may wish to provide a range of social services to its citizens, including those who are living off First Nation land. Adoption, guardianship, and the custody and care of children cannot be confined to First Nation land. These issues are central to the achievement of the objectives described in the contextual statement, and arrangements for personal jurisdiction will be part of self-government implementation. Thus, a First Nation will probably require a second list of powers that are applicable to First Nation citizens on or off First Nation land. Laws enacted by a First Nation under this list would constitute a 'personal law' that followed First Nation citizens wherever they were. These laws would not apply to non-Aboriginal people.

In the Yukon First Nation self-government agreements, two of the four lists of powers (in paragraphs 13.1 and 13.2) are not confined to the First Nation's settlement land. They would apply to citizens of

the First Nation throughout the Yukon. They are an example of personal jurisdiction.

The personal jurisdiction of an Aboriginal government, like its territorial jurisdiction, has the capacity to be compulsory. For example, an Aboriginal child who has been placed with a family living outside the Aboriginal territory would not become subject to provincial or territorial law respecting his or her custody. This would protect the child from the risk of decisions made by non-Aboriginal bodies altering the arrangements put in place by Aboriginal law. Of course, it would be open to an Aboriginal government not to exercise the full extent of its personal jurisdiction, and this would be determined by the political process internal to the Aboriginal people. It should be noted as well that the *Canadian Charter of Rights and Freedoms* would probably apply to the exercise of personal (as well as territorial) jurisdiction by an Aboriginal government. (This issue is taken up later in the paper.)

Other First Nations will undoubtedly require some legislative powers that extend to their citizens regardless of residence. In the Yukon example, even personal jurisdiction was confined to the boundaries of the Yukon, and for other First Nations this personal jurisdiction may also be confined to a province or territory, or it may apply throughout Canada.

Aboriginal self-government could exist in urban areas of Canada in the form of institutions that deliver services to First Nations, Inuit or Métis citizens living off Aboriginal territories. Personal jurisdiction would be essential to these developments. A high level of co-ordination would be required among various Aboriginal governments to serve their citizenry in an urban setting in order to avoid duplication of services and enormous cost.

Personal jurisdiction will mean that Aboriginal citizens will 'take the law with them' when they leave Aboriginal territories. This is not a

radical new concept, as it is already a part of Canadian law in many fields, like family law. We have a developed body of principles on conflicts of law to govern these situations. As well, agreements that now exist between provinces and foreign jurisdictions respecting the enforcement of maintenance and custody orders provide examples of the co-ordination of different legal regimes in the interests of effective governance. Similar devices will be available to Aboriginal governments. Moreover, in the Aboriginal context, we are already familiar with the notion of portability of rights, such as treaty rights to education, off a territorial base. Personal jurisdiction builds upon these pre-existing concepts to ensure that Aboriginal governments will have effective governing powers to enable them to accomplish governmental policy objectives like cultural protection in the context of child welfare.

Emergency Jurisdiction

It may be desirable to provide for emergency jurisdiction over persons or territory in a self-government agreement. The Yukon First Nation self-government agreements (by paragraph 13.4) attempt to anticipate some of the problems that could arise in a situation of emergency as a result of the territorial and personal restrictions on First Nations' powers. For example, a child might be in danger on settlement land, and the First Nation's child welfare officials might not know for sure whether the child was a First Nation citizen. Or a child might be in danger off settlement land, and it might not be clear which order of government had jurisdiction. To enable prompt action to be taken safely in these kinds of situations, the Yukon agreements empower the First Nation to act to relieve an emergency on settlement land, even if it is the laws of general application that are applicable. A similar power enables the Yukon territorial government to act to relieve an emergency

off settlement land even if the situation is governed by First Nation law. In each case, as soon as practicable, the matter would be returned to the correct governmental authority.

EXCLUSIVE AND CONCURRENT POWERS

Another issue that must be addressed in the jurisdictional provisions of a self-government agreement is which Aboriginal legislative powers are to be exclusive and which are to be concurrent. Exclusive powers are powers that are possessed only by the Aboriginal people; neither Parliament nor the provincial (or territorial) legislature would be able to exercise the same power. Concurrent powers are powers that are possessed not only by the Aboriginal people, but also by either Parliament or the provincial (or territorial) legislature. The disadvantage of exclusive powers is that they require the enactment of comprehensive laws by the Aboriginal people; no other laws will be available to fill gaps. The disadvantage of concurrent powers is that they give rise to the possibility of inconsistent laws, one enacted by the Aboriginal people and the other enacted by Parliament or the provincial (or territorial) legislature. Obviously, rules have to be developed to deal with inconsistency, and these are the topic of the next section of this paper.

In the *Constitution Act, 1867*, the law-making powers of Parliament, on the one hand, and the provincial legislatures, on the other, are set out in two lists, each of which is said to be exclusive. In practice, however, life does not organize itself into the tidy packages envisaged by the two lists, and considerable evolution and power sharing have been permitted through judicial interpretation since 1867. The tendency of the courts is to recognize a great deal of overlap between the two lists — in other words, concurrent powers. The protection of the environment is a good example. It is not mentioned in

either list, because the drafters of 1867 never thought that government would want or need to protect the environment. Modern Canadian courts have held that both orders of government possess extensive, overlapping powers to protect the environment. Many other examples could be given. The point is that many of the law-making powers possessed by Parliament and the provincial legislatures are concurrent. (In Australia and the United States, the constitutions establish only a few exclusive law-making powers; for the most part, law-making powers are concurrent.)

The Yukon First Nation self-government agreements (by paragraph 13.1) include a short list of exclusive powers. Generally speaking, the list encompasses the rules of internal management of the First Nation's affairs, and the administration of rights and benefits under its land claims agreement. The other lists, described in the previous section, contain concurrent powers.

INTERGOVERNMENTAL CO-OPERATION IN CANADA

The Canadian federation has existed since 1867. Throughout this time, federal and provincial governments have exercised governmental powers over the same territory and over the same people (although the exercise of jurisdiction by the federal and provincial governments 'over' Aboriginal peoples has been controversial). Despite many minor disputes and occasional lawsuits, the two orders of government have learned to live harmoniously together. No government is an island unto itself, and an extensive network of relationships has developed at the ministerial and official levels to share information and ideas and, where appropriate, co-ordinate policies. In many fields of concurrent jurisdiction, formal agreements have been entered into to ensure that both orders of government work together in pursuit of common goals.

For example, provincial health care plans and provincial social assistance plans are funded in part by the federal government pursuant to shared-cost agreements that define the basic principles underlying both kinds of plans. Another example is the policing agreements, under which the Royal Canadian Mounted Police provides policing services to eight provinces and many municipalities in return for provincial and municipal sharing of the cost of the services. Another example is the tax collection agreements, under which the federal government collects provincial income taxes on behalf of nine provinces in return for provincial agreement to use the same tax base as the federal income tax.

Aboriginal governments enter this complex network of federal-provincial relationships. They will find advantages in many of the techniques of co-operation that have been developed by the federal and provincial governments for meeting the needs of citizens in different regions and circumstances. For example, an Aboriginal government may enter into tax-collection agreements with another government. An Aboriginal government may choose to 'rent' the policing or prosecutorial services of another government. There may be responsibilities a First Nation prefers to assume gradually, allowing services to be rendered to First Nations citizens by another government until the First Nation has developed the capacity or policy to deliver the services itself.

The important point regarding intergovernmental co-operation is that self-government does not occur in a political vacuum. An Aboriginal government will not have to assume immediately all the functions of a modern government. Agreements of various kinds are required to make an order of government fully operational. Moreover, intergovernmental co-operation and sharing of jurisdiction and resources are the norm rather than the exception in Canadian federalism.

A self-government agreement must deal with the relationship between federal and provincial (or territorial) laws, on the one hand, and Aboriginal laws, on the other. In the federal-provincial context, conflicts between federal and provincial laws are resolved by the rule of federal paramountcy: the provincial law must yield to the inconsistent federal law. This rule is not as important as it might seem, because the courts accept a very narrow definition of inconsistency: only if one law expressly contradicts the other is there an inconsistency that triggers the rule of federal paramountcy. If the two laws can exist side by side without contradiction, there is no inconsistency, and both laws remain operative.

For example, in *Construction Montcalm v. Minimum Wage Commission*, the Supreme Court of Canada held that a federal law stipulating a minimum wage for federal contractors was not inconsistent with a provincial law that stipulated a higher minimum wage.²⁷ The Supreme Court of Canada reasoned that the federal law did not prohibit a higher wage; therefore, both laws could co-exist. The practical result was that the federal contractor had to pay the higher Quebec minimum wage and could not rely on the lower federal figure. This case demonstrates that the courts will go to great lengths to uphold validly enacted legislation and will be extremely reluctant to find inconsistency if the laws can be reconciled.

This narrow definition of inconsistency means that the doctrine of federal paramountcy applies only rarely. Most of the time, when federal and provincial laws are applicable to the same facts, the courts allow both laws to co-exist. There is nothing to suggest that this same approach would not be brought to an analysis of inconsistency in the context of Aboriginal laws.

Displacement of Federal and Provincial Laws

Each self-government agreement must provide for the transition to self-government, so as to guard against a vacuum of laws during the initial period before the Aboriginal government has had time to make laws within its areas of responsibility. A similar problem arose in 1867 when the Parliament of Canada and the legislatures of Ontario and Quebec were first established and empowered. (The other provinces already had legislatures.) The solution in 1867 was embodied in section 129 of the *Constitution Act, 1867*, which sensibly provided that all laws in force in 1867 should continue in force until they were repealed, abolished or altered by the Parliament of Canada or the legislature of a province. This provided for the continued existence of pre-Confederation laws. Although the main purpose of section 129 was transitional, some pre-Confederation laws have never been replaced and continue in force today.

The Charlottetown Accord borrowed from section 129 in proposing a similar rule for the transition to self-government. The Accord provided (by clause 47) that "federal and provincial laws will continue to apply until they are displaced by laws passed by governments of Aboriginal peoples pursuant to their authority". This clause would have ensured that pre-self-government laws would continue to apply until they had been displaced by Aboriginal laws.

A transitional clause of this kind would not only govern the transition to self-government. It would also have a permanent effect. The clause would have established an important general rule that Aboriginal laws could 'displace' laws of general application. In other words, where Aboriginal laws were inconsistent with laws of general application, the Aboriginal law would be paramount and the law of general application would have to yield.

The Charlottetown Accord proposed (also by clause 47) one exception to the general rule of Aboriginal paramountcy. Where a federal or provincial law was "essential to the preservation of peace, order and good government in Canada", then that law would prevail over an inconsistent Aboriginal law. The meaning of this peace, order and good government exception has been the topic of some debate,²⁸ and certainly this provision was the most troubling for Aboriginal people during debate on the Accord. In our view, however, the exception would be given a narrow scope by the courts, drawing by analogy on the existing jurisprudence that has given a narrow interpretation to the words "peace, order and good government" in section 91 of the *Constitution Act, 1867*. Without going into detail,²⁹ the exception would probably cover emergency laws and laws designed to prevent injury or harm to non-Aboriginal people or land. It is perfectly reasonable that certain laws of this category (essential for peace, order and good government) should apply to Aboriginal peoples and should not be subject to displacement by Aboriginal laws. For example, if a province required all residents to be inoculated against an epidemic of smallpox, Aboriginal peoples should be subject to the same requirement as non-Aboriginal people. Indeed, no Aboriginal government would want to create health risks for Aboriginal people or their non-Aboriginal neighbours, so these kinds of limits on Aboriginal government jurisdiction would not be major issues from a pragmatic perspective.

The Charlottetown Accord did not indicate what was to be the definition of inconsistency for the purpose of the paramountcy provisions, but silence would probably mean that the narrow definition developed in the federal-provincial context would also apply here. For example, a First Nation might enact laws to regulate the discharge of waste material by a business located on First Nation land. The same

business may be subject to controls enacted by the province. In this situation, the courts would probably hold that there was no inconsistency between the two laws: the business would be obliged to obey both the First Nation rules and the provincial rules. If the First Nation's rules were the stricter of the two, then the First Nation would in effect be the primary legislator.

Yukon Self-Government Agreements

The Yukon First Nation self-government agreements, like the Charlottetown Accord, provide (by paragraph 13.5) that laws of general application shall continue to apply to the First Nation, its citizens and First Nation land. In the event of inconsistency between a law of the First Nation and a law of the Yukon, it is the law of the First Nation that is paramount. In the event of inconsistency between a law of the First Nation and a federal law, the self-government agreements are incomplete. They provide (by paragraph 13.5.2) for a future agreement between the First Nation and Canada "which will identify the areas in which the laws of [the First Nation] shall prevail over federal laws". No such agreement has yet been entered into.³⁰

We would interpolate the editorial comment that it is an unsatisfactory feature of the Yukon self-government agreements that they do not settle the precise form of the rules of paramouncy between federal and First Nations laws. Ideally, all jurisdictional issues should be settled in the self-government agreement and not postponed to some future process. We note, however, that the provision that was included does contemplate that there will be areas in which the laws of a First Nation will be paramount over federal laws.

With respect to inconsistency between a First Nation law and a Yukon law (where the rule is First Nation paramouncy), the Yukon

agreements substitute a broader definition of inconsistency for the narrow common-law definition. According to clause 13.5.3 of the Yukon agreements, a Yukon law shall be inoperative "to the extent that it provides for any matter for which provision is made in a law enacted by [the First Nation]". This means that whenever a First Nation law covers a particular field that is also occupied by Yukon law, the Yukon law is displaced. It is not necessary to show that the two laws are inconsistent in the narrow sense of contradictory; the mere fact that they make provision for the same matter would cause the Yukon law to yield. The general idea here is that once a First Nation elects to provide a particular service (formerly provided by the Yukon) or regulate a particular activity (formerly regulated by the Yukon), then the First Nation would become the sole provider or regulator, requiring the Yukon territorial government to withdraw from the field.

ADMINISTRATION OF JUSTICE

An Aboriginal government will require the power to enforce its own laws and may also wish to enforce those federal and provincial (or territorial) laws that continue to apply on Aboriginal land. The Aboriginal people will want policing, prosecutions, courts and corrections to operate so as to ensure a peaceful and law-abiding Aboriginal community. The people will also want all aspects of the justice system to be administered with sensitivity to Aboriginal ways and Aboriginal problems. Indeed, the administration of justice is a critical area given the numerous recent studies indicating that discrimination against Aboriginal people in the Canadian criminal justice system requires the development of new approaches to the field and greater autonomy for Aboriginal peoples to design and implement criminal justice measures in their communities.³¹

The federal and provincial (or territorial) governments will also be concerned with enforcing their laws of general application on Aboriginal land. Given the continuing interests of the other two orders of government, and the limited resources of personnel and funds that are available to an Aboriginal government, it may be realistic and cost-effective for an Aboriginal government to exercise its power over the administration of justice in accordance with a justice agreement entered into with the other two orders of government. In that way, the Aboriginal government would gain access to services and funding that can be supplied by the other orders of government, and all three orders of government — federal, provincial (or territorial) and Aboriginal — would participate in the construction of a regime that is compatible with their legitimate objectives.

The Yukon First Nation self-government agreements provide one possible model for the administration of justice provisions. Under those agreements, a First Nation has, in its catalogue of legislative powers on First Nation land (paragraph 13.3.17), the power over "administration of justice".³² However, the First Nation agrees (paragraph 13.6.3) not to exercise the power unilaterally for a period of ten years. For that time, the power can be exercised only in accordance with a justice agreement entered into with federal and territorial governments. The agreements (paragraph 13.6.1) oblige the First Nation and both governments to negotiate a justice agreement, and once an agreement is negotiated the First Nation would exercise its power over the administration of justice to give effect to the agreement until a justice agreement is reached; or, if no agreement is reached, there are (in paragraph 13.6.4) interim provisions for enforcing First Nation laws, jurisdiction of courts and corrections. The interim provisions are designed to be replaced by a justice agreement, but if no agreement is reached, the interim provisions expire at the end of the ten-year period (paragraph 13.6.6). At that time,

the First Nation assumes full possession of its power over the administration of justice. If at that time there is a justice agreement in force, then of course the First Nation would be bound to act in accordance with the agreement.

JUSTICIABILITY OF SELF-GOVERNMENT

Disputes of various kinds will inevitably arise out of the interpretation, administration or implementation of self-government agreements once concluded. Even before this, disputes will arise regarding the scope of Aboriginal government jurisdictions and fiscal matters. Many of these disputes will raise legal issues and accordingly will come within the jurisdiction of the provincial (or territorial) or federal courts. Unless special courts are established to address legal issues relating to self-government agreements — which would be constitutionally possible but complex — legal conflicts will come before Canadian courts for resolution. The additional burden on Canadian courts is bound to be significant, and active programs for continuing judicial education in the field of Aboriginal and treaty rights and the recruitment of Aboriginal people for judicial appointments are two steps that should be taken immediately to meet the inevitable legal challenges in the transition to self-government for Canadian courts.

In the broader context of dispute resolution, we contemplate that the kinds of disputes that will arise during this transition period will be both internal to the Aboriginal community and external to it. Internal disputes are those among citizens of Aboriginal communities or between citizens and Aboriginal governments. Internal disputes may be criminal or civil (including of a family nature) and will require community dispute resolution processes as part of the self-government arrangement. External disputes are those involving citizens of the Aboriginal

community and non-Aboriginal governments or Aboriginal governments and non-Aboriginal governments. While Aboriginal peoples may wish to establish justice systems to govern internal relations between their citizens residing on their territories, and in some cases non-residents and visitors (and the Yukon example is a model here), there is an immediate need to consider how disputes of an external nature will be resolved.

To date, all disputes between Aboriginal peoples and governments have been brought before the Canadian courts. As the issues become more complex and specialized during the negotiation or implementation of self-government, the Canadian courts will not be the most efficient and cost-effective forum for dispute resolution.³³ They have also been questioned as appropriate forums for resolving the disputes between Aboriginal peoples and government on the basis that these disputes are intercultural and the courts do not reflect Aboriginal culture or even an equal power relationship between Aboriginal and non-Aboriginal people in Canadian society.³⁴ We are of the view that it is preferable to establish processes to facilitate the out-of-court resolution of disputes in a non-adversarial and informal atmosphere, using mediators, arbitrators and advisers who are familiar with the self-government agreement and with Aboriginal ways. Disputes arising from the negotiations process and from the process of implementing agreements are ripe for consideration in non-judicial forums like tribunals. Moreover, a tribunal, which could be composed of individuals expert in the subject area, could be cost-efficient, expeditious and respectful of the different cultural and legal traditions of the parties. Such a tribunal could be established either in a self-government agreement or in a framework agreement that called for self-government negotiations.

The Yukon First Nations have set up alternative dispute resolution procedures of mediation and negotiation in their land claims

agreements. The Yukon First Nation self-government agreements, by paragraph 24.0, make those procedures available for disputes arising under the self-government agreements. This model is an attractive one and could be followed in other agreements.

While various forms of alternative dispute resolution³⁵ can be established to assist in the process of self-government negotiations and in the implementation of self-government agreements, legal questions will inevitably arise from time to time that will have to be resolved by the courts. It is likely that a Canadian court, when faced with disputes relating to the scope of self-government powers or other legal issues arising out of a self-government agreement, would approach this task with the large, liberal and purposive approach to the Constitution seen in Charter cases where other rights protections are being considered. This approach entails examining the purpose of the transition to self-government and the need to respect constitutionally protected Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. The fact that Aboriginal peoples are in a vulnerable position in their relations with the Crown, given that the Crown is more powerful politically and has more resources, would also influence the court in scrutinizing the conduct of government in its relations with Aboriginal peoples to ensure that its duties as a fiduciary were fully respected.

FINANCING SELF-GOVERNMENT

For Aboriginal governments and Aboriginal jurisdictions to be meaningful, they must have an adequate financial basis. This means that Aboriginal governments should have access to the same fiscal arrangements as are available to other governments, namely levying taxes, transfers from the other orders of government, and borrowing

when necessary. All these matters should be dealt with in the self-government agreements.

Taxation

The *Constitution Act, 1867* (which says nothing about Aboriginal governments) confers taxation powers on Parliament and the provincial legislatures. It distinguishes between direct and indirect taxes. Direct taxes are those that are unlikely to be passed on by the initial payer of the tax. Direct taxes have been held to include income taxes, property taxes and sales taxes (provided the tax is imposed on the consumer, not the vendor). Indirect taxes are those that tend to be passed on by the initial payer of the tax, so that it is hard to know where their burden ultimately falls. Customs and excise taxes fall into the indirect category, because the importer or manufacturer is expected to include the taxes in the price charged for the imported or manufactured product, and the ultimate burden of the tax is passed on to the consumer.

Under the *Constitution Act, 1867*, the provinces are generally limited to direct taxes, the reasoning being that they should not be allowed to export the burden of their taxes to the residents of other provinces; the federal Parliament, on the other hand, is authorized to levy both direct and indirect taxes.³⁶ Because both orders of government have the power to levy direct taxes, the taxpayer is often in the position of having to pay taxes to two governments. In the case of the personal income tax, the federal government has entered into tax collection agreements with nine of the ten provinces, under which the federal government agrees to collect the province's share of the tax, and the provinces agree to use the same tax base as that of the federal tax. This relieves the taxpayer from the need to file two returns with different information and calculations.

There is also a level of taxation at the municipal level, which is exercised by municipalities under powers delegated to them by the provinces or territories. The most common municipal tax is a tax on real property in the municipality.

The obvious approach to Aboriginal taxation powers would be for Aboriginal peoples to have the same power to levy direct taxes as the provinces. This is not now the case with *Indian Act* bands, which under section 83(1)(a) of the *Indian Act* have the power to levy municipal-like property taxes, subject to the approval of the minister of Indian affairs. The *Sechelt Indian Band Self-Government Act* confers a power of taxation that is similar to the *Indian Act* power, although there is no requirement of ministerial approval.

The Yukon First Nation self-government agreements, by paragraph 14.0, confer on the First Nations not only the power to levy property taxes, but also the power to levy other kinds of direct taxes on their citizens on settlement land. However, the agreements contemplate that the First Nations will enter into tax-sharing arrangements with the Yukon territorial government so that there is a sharing of tax room and general co-ordination between the tax systems of the two governments. Only pursuant to these intergovernmental arrangements would the First Nations acquire the power to levy taxes other than property taxes on non-Aboriginal people and corporations on settlement land. Yukon tax-sharing agreements have not yet been entered into, but they could, for example, provide for a single tax-collection agency for both Yukon and First Nation taxes, as well as agreements about the rates of tax that each government would impose, so that the tax-filing obligations and the total burden of taxation were reasonable and predictable.³⁷

Transfer Payments

Even with full powers of direct taxation, most Aboriginal communities lack the tax base that would enable them to raise enough revenue to provide services at a level that is appropriate for Canadian citizens. This is also true of the have-not provinces and both the territories, all of which are net beneficiaries of federal transfer payments. Section 36(2) of the *Constitution Act, 1982* provides as follows:

Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

This provision sets a standard for federal transfer payments to the provinces, but it says nothing about the territories or about Aboriginal governments.

In the discussions leading to the Charlottetown Accord, the Aboriginal organizations were unsuccessful in their efforts to secure an amendment to section 36(2) to extend it to Aboriginal governments. Instead, the Accord (by clause 50) provided that the financing of self-government was to be dealt with in a later political accord. That political accord would "commit federal and provincial governments to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist those governments to govern their own affairs". The Charlottetown Accord (still in clause 50) required explicitly that Aboriginal governments had to be capable of "providing essential public services at levels reasonably comparable to those available to other Canadians in the vicinity". The Charlottetown Accord thus essentially accepted the principle that transfer payments to Aboriginal governments should be sufficient to enable those governments to provide public services of similar quality to those

provided by other orders of government. This standard should be reflected in financing agreements with Aboriginal peoples.

Yukon Example

The Yukon First Nation self-government agreements, whose terms were settled before the Charlottetown Accord, oblige Canada (by paragraph 16.0) to enter into a "self-government financial transfer agreement" with each First Nation "with the objective of providing [the First Nation] with resources to enable [the First Nation] to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation". The language used obviously borrows from section 36(2) of the *Constitution Act, 1982*, and the reference to the Yukon (along with other provisions, notably paragraph 16.4.4) points the negotiators in the direction of the formula that is used for financing the Yukon territorial government. Some of the financing of First Nation governments would inevitably come out of existing transfers to the Yukon territorial government in recognition that services had been shifted from the Yukon to the First Nation. But the self-government agreements, by paragraph 18.1, provide that a decrease in federal funding to the Yukon must not be so severe as to cause any reduction in the level or quality of Yukon services to non-Aboriginal Yukon residents.

The Yukon First Nation self-government agreements make provision (by paragraph 24) for a failure to agree upon the terms of the self-government financial transfer agreement. In that event, either party may refer the matter to a mediation process that is provided for in the land claims agreement; if mediation fails, then the matter can be referred by the parties to an arbitration process that is also provided for in the land claims agreement.

While jurisdictional issues must be settled in a self-government agreement, it is only the adequate financing of self-government that guarantees that an Aboriginal government will become operational. The Yukon model suggests one route, and certainly a combination of taxing powers and transfer payments is required to implement fully the inherent right of self-government.

STATUS OF SELF-GOVERNMENT AGREEMENTS

Protection from Unilateral Alteration

The Charlottetown Accord contemplated (in clause 46) that self-government agreements would create treaty rights that would be constitutionally protected by section 35(1) of the *Constitution Act, 1982*. Through section 35(1), as well as the express recognition of the inherent right, Aboriginal self-government would have been a constitutionally protected order of government within the Canadian federation. The failure of the Charlottetown Accord means that these provisions are not in the Constitution. Under the present Constitution, without the Charlottetown amendments, what is the status of self-government agreements?

A self-government agreement that was part of a land claims agreement would, of course, be constitutionally protected under section 35. A self-government agreement that was not part of a land claims agreement would, at least if it contained no language to the contrary, be a modern treaty, which would also be constitutionally protected under section 35. It is clear that "an exchange of solemn promises" is a treaty, even if no cession of land is involved.³⁸ It is also clear from subsection (3) of section 35 that the section applies to post-1982 treaties; the reference in subsection (3) to "land claims agreements" would not exclude other kinds of modern treaties. It follows that a self-government

agreement would create treaty rights that would be constitutionally protected by section 35. This would mean that an attempt by the Parliament of Canada or a provincial (or territorial) legislature to alter the terms of a self-government agreement, without the consent of the affected First Nation, would be struck down by the courts.

The present policy of the government of Canada is to deny treaty status to self-government agreements. This policy is inconsistent with an effective transition to self-government and needs to be reconsidered. The Yukon First Nation final agreements provide that the self-government agreements are not to be regarded as creating treaty rights that are protected by section 35. The federal government's policy predates the Charlottetown Accord and reflects a hope that the constitutional status of Aboriginal self-government could be dealt with in a comprehensive constitutional amendment. The failure of the Charlottetown Accord removes the reason for the government's policy and will, we would hope, lead to a reversal of the policy; but this has not yet happened, and the policy remains in place. The policy of denying treaty status to self-government agreements has been implemented by a clause in self-government agreements (or, as in the Yukon case, in a land claims agreement that includes or contemplates a self-government agreement) under which the federal government and the First Nation concerned agree that the self-government agreement is not to create treaty rights within the meaning of section 35. This kind of clause is considered effective in denying such agreements treaty status under section 35 of the *Constitution Act, 1982*.

A self-government agreement that has, by express agreement, been denied the status of a treaty may nevertheless be constitutionally protected. This is because section 35 protects Aboriginal as well as treaty rights, and the inherent right of self-government is an Aboriginal right. The self-government agreements can be regarded as giving form

and structure to the Aboriginal right of self-government. The agreements do not create the right, which is inherent. The agreements are necessary, because in the twentieth century Aboriginal governments have to co-exist with federal and provincial (or territorial) governments; the agreements settle, among other things, mutually acceptable rules to govern the relationship between the three orders of government. It is still the case, however, that when a First Nation passes laws and exercises other powers of self-government it is exercising an inherent power of self-government that is protected by section 35. If this is so, then any attempt by the Parliament of Canada or a provincial (or territorial) legislature to change the terms of a self-government agreement without the consent of the affected First Nation would be struck down by the courts.

Our conclusion is that a self-government agreement that has, by express agreement, been denied the status of a treaty may still be constitutionally protected under section 35 of the *Constitution Act, 1982* as an expression of Aboriginal rights. In our opinion, this is another reason why the federal government should reconsider its policy of denying treaty status to self-government agreements. There is no point in denying treaty status to the agreements if the right of self-government, as elaborated by the agreements, is constitutionally protected anyway. Of course, as mentioned earlier, the understandable federal preference for a general constitutional amendment respecting self-government, which seemed to have been achieved at Charlottetown, is probably now beyond reach. In the absence of any realistic prospect of a general constitutional amendment, the best course is to accord treaty status to self-government agreements. That provides the Aboriginal order of government with secure constitutional protection under section 35. This would mean that changes in a self-government agreement could not be made by the unilateral action of Parliament³⁹

but would have to be made by the amending procedures set out in the agreement, which would obviously involve the consent of the First Nation.

Application to Third Parties

Where Aboriginal self-government enjoys the constitutional protection of section 35, either because it is based on a treaty, or because it is an exercise of an Aboriginal right, it is still desirable that legislation be enacted, certainly by the Parliament of Canada, and perhaps by the provincial (or territorial) legislature as well, to implement the underlying self-government agreement. (This is also true of land claims agreements.⁴⁰) The point of legislation is to make certain that the self-government agreement (and therefore all the powers of Aboriginal self-government) is binding on third parties. In the absence of legislation, non-Aboriginal persons or corporations to which an Aboriginal law was applied might be successful in arguing that they were not bound by the Aboriginal law, because they were not a party to the agreement that defined the scope of the Aboriginal government's power to make the law. The enactment of a statute precludes this line of argument, because a statute is obviously binding on non-Aboriginal and (subject to section 35) Aboriginal people alike.⁴¹

LIMITATIONS ON ABORIGINAL GOVERNMENTS

Like other modern governments, Aboriginal governments are subject to a variety of limitations. The limits are external and internal. In the external category are the *Canadian Charter of Rights and Freedoms* and international human rights standards. In the internal category are limitations imposed by Aboriginal peoples' own constitutions and laws, which must provide for checks and balances on Aboriginal governments

and would include financial control and accountability procedures and standards for conflicts of interests and ethics of public officials. While these kinds of internal procedures may be ‘foreign’ in a sense to Aboriginal cultures and traditions, the values of public duty and responsibility are integral to good government, especially in a period of transition away from the *Indian Act*. In a contemporary government context, measures to deal with financial accountability and conflicts of interest are cornerstones of responsible and accountable government.⁴²

Canadian Charter of Rights and Freedoms

Aboriginal leaders, and particularly the First Nations leadership, have expressed reservations about the application of the Charter to Aboriginal governments. The reasons for their reservations are twofold. First is the fact that the Charter was developed without the involvement or consent of Aboriginal peoples and does not accord with Aboriginal culture, values and traditions. Second, the Charter calls for an adversarial approach to resolving conflicts of rights before Canadian courts, and there is a concern that this litigation model of human rights dispute resolution would undermine Aboriginal approaches to conflict resolution that are just now being revived. On the other side of the issue, certain Aboriginal women’s organizations, such as the Native Women’s Association of Canada, have insisted that the Charter must apply to all Aboriginal governments to ensure that human rights standards are respected.

While a dialogue continues on the application of the Charter, many Aboriginal people see the application of the Charter as simply inappropriate, because it does not reflect Aboriginal values or approaches to resolving disputes. This is not to say that Aboriginal peoples have no concern about individual rights and individual security

under Aboriginal governments. The concern rests more with the Charter's elevation of the guaranteed legal rights over unguaranteed social and economic rights, the emphasis on rights rather than responsibilities, the failure to emphasize collective rights, and the litigation model of enforcement. These are among the features of the Charter that are alien to many Aboriginal communities. The solution might be, as we describe below, the development of an Aboriginal charter (or charters) of rights that could exist alongside the Canadian Charter.

Section 32

The extent to which Aboriginal self-government is constrained by the Charter is not entirely clear. Section 32 of the Charter provides that the Charter applies to "the Parliament and government of Canada" and "the legislature and government of each province". The Supreme Court of Canada has held that this is an exhaustive statement of the bodies that are bound by the Charter.⁴³ Section 32 does not contemplate the existence of an Aboriginal order of government. That is why the Charlottetown Accord draft legal text (by clause 27) proposed the amendment of section 32 to make it include an express statement that the Charter also applies to "all legislative bodies and governments of the Aboriginal peoples of Canada".

Despite the silence of section 32 on Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the Charter.⁴⁴ This would certainly be the result where self-government institutions have been created or empowered by statute, because the Charter applies to all bodies exercising statutory powers.⁴⁵ Where self-government institutions have been created by an Aboriginal people and empowered by a self-government agreement, the source of

the self-government powers is probably a treaty right (if the self-government agreement has treaty status) or an Aboriginal right (the inherent right of self-government) or both. Even here, however, as noted earlier, the self-government agreement needs the aid of a statute to make clear that the agreement is binding on third parties. The statute implementing the self-government agreement probably constitutes a sufficient involvement by the Parliament of Canada to make the Charter applicable.

Section 25

Assuming that the Charter is applicable to Aboriginal governments, it is necessary to consider the effect of section 25 of the Charter. Section 25 provides that the Charter is not to be construed "so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada". The main purpose of section 25 is to make clear that the prohibition of racial discrimination in section 15 of the Charter is not to be interpreted as abrogating Aboriginal or treaty rights possessed by a class of people defined by culture or race. In other words, it is designed as a shield to guard against diminishing Aboriginal and treaty rights in situations where non-Aboriginal people might challenge the special status and rights of Aboriginal peoples as contrary to equality guarantees. However, because Aboriginal governments were not contemplated by the drafters of the Charter, it is not clear to what extent section 25 might be interpreted to exempt the exercise of Aboriginal self-government from the Charter.

In our opinion, it is unlikely that a court would regard section 25 as giving Aboriginal governments blanket immunity from the Charter, even though the governments were exercising powers of self-government derived from a treaty or from an Aboriginal right (the

inherent right). However, it is likely that some actions of Aboriginal governments would be exempt from the Charter by virtue of section 25 and that the Charter would be interpreted in a manner deferential to and consistent with Aboriginal culture and traditions. Immunity from Charter application might occur, for example, where an Aboriginal government had taken measures to implement or self-regulate Aboriginal or treaty rights of harvesting, hunting, and fishing or the management of Aboriginal lands and resources. In that case, the Aboriginal government is invoking not only a right of governance, but also another Aboriginal or treaty right.

Interpretations of the Charter that are consistent with Aboriginal cultures and traditions would likely be found when the court is faced with a situation where different standards apply and the difference is integral to culturally-based policy within an Aboriginal community. For example, if an Aboriginal juvenile justice system were created in which legal counsel was not provided to an accused person, would this be considered unconstitutional as denying a legal right to an accused person? If the juvenile justice system reflected Aboriginal culture and traditions, section 25 would shield such practices from attack based on the values expressed in the legal rights provisions of the Charter. In other words, the legal rights provisions would be given a new interpretation in light of Aboriginal culture and traditions.

The important point here is that the application of the Charter, when viewed with section 25, should not mean that Aboriginal governments must follow the policies and emulate the style of government of the federal and provincial governments. Section 25 allows an Aboriginal government to design programs and laws that are different, for legitimate cultural reasons, and have these reasons considered relevant should such differences invite judicial review under the Charter. Section 25 would allow Aboriginal governments to protect,

preserve and promote the identity of their citizens through unique institutions, norms and government practices.

Aboriginal Charters of Rights

The uncertainties just described in the application of the Charter to Aboriginal governments would be diminished by the development of Aboriginal charters of rights. Because of the cultural differences of Aboriginal communities and the need to break out of the tradition of imposed legal norms and instruments, restrictions on the powers of Aboriginal governments should be defined by Aboriginal peoples themselves. There has been some discussion among Aboriginal people of the development of Aboriginal charters of rights that would either displace the Canadian Charter or exist alongside the Canadian Charter in its application to Aboriginal governments.

It is only realistic to recognize that a single Aboriginal charter would be very difficult to develop, given the diversity of Aboriginal peoples. A number of Aboriginal charters is more likely than a single one. Nor should we forget the difficulty (or perhaps impossibility) of securing the amendment of the Constitution of Canada that would be required to displace the Canadian Charter. These realities lead us to recommend that each First Nation, Métis and Inuit group should develop its own human rights provisions as part of its own constitution. Such provisions would afford protection for those human rights that each community regarded as paramount and could also provide for procedures to reconcile human rights disputes when they arise. In the absence of a constitutional amendment, these provisions could not completely displace the Canadian Charter, but they would not be ignored by the courts, which would then be more likely (invoking

section 25) to respect laws and decisions that had been made by an Aboriginal government within the framework of its constitution.

CONCLUSION

Co-operation, imagination and political will are needed in order progress in the achievement of Aboriginal self-government. But in our opinion, there are very few significant constitutional impediments to the achievement of Aboriginal self-government in Canadian constitutional law. Section 35 of the Constitution Act, 1982 provides the base upon which Aboriginal peoples and governments can construct self-government agreements and invest the agreements with constitutional status.

There are many important inducements to proceed with implementing Aboriginal self-government in Canada. Legally, the litigation of matters of self-government is very open-ended, and the outcomes are unpredictable. The issues are complex, and legal proceedings are lengthy and costly.⁴⁶ Moreover, the outcome of litigation is usually more negotiation, as courts have never imposed an agreement on the parties and perhaps could not because of the nature of third-party interests in some of the litigation. It is clearly in the best interests of all parties to come to a negotiation table where an agreement can be reached based on reasoning broader than that permitted by legal doctrine and constitutional remedies. Such an agreement provides the certainty that is so conspicuously lacking in the general law of Aboriginal rights. The achievement of self-government agreements requires significant change in government policy and new priorities directed at rebuilding relationships between the federal government and Aboriginal peoples, as well as with provincial and territorial governments.⁴⁷

Many specific Aboriginal policies need to be reconsidered by government to facilitate a successful negotiation process. Some policies that were part of government approaches to Aboriginal peoples before the Charlottetown Accord need to be evaluated and abandoned in favour of approaches more consistent with the commitment to implement an inherent right of self-government. The Yukon example, while it may not be useful for all Aboriginal peoples, is worth evaluating carefully not only in terms of its creative approaches to jurisdiction and financing but also in terms of problems like the absence of treaty protection of rights in the agreements.

Our conclusions regarding implementation of the inherent right of self-government can be summarized as follows:

1. The defeat of the Charlottetown Accord should not be permitted to halt movement toward implementing Aboriginal self-government. Indeed, the remarkable consensus at Charlottetown on the nature of the inherent right and the process to invigorate it should encourage the movement to self-government.
2. Many of the terms of the Charlottetown Accord, and certainly the recognition of the inherent right and the contextual statement, could be included in a political accord between governments and Aboriginal organizations that could form the framework for specific self-government negotiations. This framework could be comprehensive for all Aboriginal peoples or it could involve separate frameworks for Treaty First Nations and non-treaty Aboriginal peoples.
3. Self-government should be implemented by self-government agreements between governments and First Nations. Agreements will avoid the need for unilateral initiatives by Aboriginal peoples, which would be bound to lead to disputes and litigation with unpredictable outcomes.

4. Self-government agreements should include agreed-upon lists of the powers that are suitable and required for governance for the particular Aboriginal people. Some powers may be exclusive and others concurrent. Some powers may be based on a personal jurisdiction over a particular Aboriginal people; others may be based on a territorial jurisdiction over the Aboriginal people's territory. Emergency jurisdiction may also be needed.
5. Self-government agreements must include transitional provisions for the application of laws of general application during the start-up period before an Aboriginal people has enacted the laws and assumed the responsibilities that are contemplated by its agreement.
6. Self-government agreements must include provisions to resolve inconsistencies between the laws of an Aboriginal people and laws of general application. These provisions would stipulate what kinds of laws took priority in a situation of conflict.
7. Self-government agreements may include provisions for co-ordination between the policies of an Aboriginal people and those of the federal or provincial (or territorial) government in fields of concurrent jurisdiction. The administration of justice and taxation are two of the areas where a sharing of resources and agreement on common policies are likely to be advantageous to Aboriginal peoples.
8. Self-government agreements should confer jurisdiction on the courts to settle questions of law arising from the interpretation or administration of the agreements. Agreements, including a framework agreement, should establish alternative dispute resolution procedures for resolving disputes on issues of process and implementation of the right of self-government.

9. Self-government agreements must make secure provision for the financing of self-government by taxation and transfers from other orders of government.
10. Self-government agreements should be constitutionally protected so that they are not vulnerable to alteration by unilateral action by Parliament or a provincial legislature. This does not require an amendment to the Constitution, because a self-government agreement can be a modern treaty within the protection of section 35 of the *Constitution Act, 1982*. The federal government's policy of denying treaty status to self-government agreements should now be reversed.
11. Self-government agreements, even if constitutionally protected, should still be implemented by federal and perhaps provincial (or territorial) legislation to make sure that the terms of the agreements are binding on third parties that were not parties to the agreement.
12. The *Canadian Charter of Rights and Freedoms* probably applies to Aboriginal governments, but would probably be interpreted as permitting Aboriginal peoples to pursue culturally-based policies that are respectful of individual rights but that differ from the practices of federal or provincial governments.
13. All Aboriginal peoples will have to adopt constitutions setting up the institutions that will exercise the powers of self-government. Those constitutions could include a charter of rights that was considered to be appropriate to the values and aspirations of the particular Aboriginal people. Any such Aboriginal charter would need the support of the Aboriginal people, and it could be interpreted alongside the Canadian Charter, although it would not replace the *Canadian Charter of Rights and Freedoms*.

NOTES

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1. In this paper we use the term 'Aboriginal peoples' to refer to First Nations (Indian), Inuit and Métis peoples collectively. When reference is made to particular negotiations or agreements, the more specific terminology is used.
2. Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Minister of Supply and Services, 1993).
3. Statement of Liberal leader Jean Chrétien in Saskatoon, Saskatchewan, 8 October 1993, when he unveiled the Aboriginal platform of the Liberal Party of Canada. The Liberal Party platform, usually referred to as the Red Book (Liberal Party of Canada, "Creating Opportunity: The Liberal Plan for Canada" (1993), p. 2), contains several critical policy commitments, including a commitment that "The Liberal government will act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right within the meaning of section 35 of the *Constitution Act, 1982*".
4. For example, we do not consider arguments rooted in Aboriginal peoples' nation-to-nation relationship with the Crown or Aboriginal law and spirituality or the international legal arguments on self-determination.

5. *Consensus Report on the Constitution of August 28, 1992* (Ottawa: Minister of Supply and Services, 1992), p. 12 [referred to hereafter as Consensus Report].
6. *R. v. Sparrow* [1990] 1 S.C.R. 1075. In this case, Dickson C.J. and La Forest J., writing for a unanimous Supreme Court of Canada, expressly recognized the right of a member of the Musqueam Indian band to fish for salmon in the Fraser River "where his ancestors had fished from time immemorial".
7. Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", *Queen's Law Journal* 8 (1983), p. 242. See also Slattery, "Understanding Aboriginal Rights" *Can. Bar Rev.* 66 (1987), p. 314.
8. The issues are not suitable for resolution by courts because only political discussions can adequately address matters of jurisdiction, financing and intergovernmental co-operation. Legal reasoning in the constitutional context is not broad enough to embrace all of these dimensions.
9. In our view, comprehensive constitutional amendments on Aboriginal self-government would be the preferred approach because they would assist in clarifying the status and nature of Aboriginal governments in light of the already defined federal and provincial jurisdictional structure of the Canadian federation. Moreover, comprehensive constitutional amendments would ensure that Aboriginal government jurisdiction not be 'inferior' in status to the existing two orders of government, which already have a secure constitutional footing with established rules for the resolution of jurisdictional conflicts. This is not to say that the courts would not support exclusive Aboriginal jurisdiction over certain subject matters without constitutional reforms, but that comprehensive amendments would save resources on litigation and acrimonious jurisdictional conflicts.
10. Consensus Report, p. 12.
11. The Accord included provisions allowing for Aboriginal peoples who already have treaties with the Crown to elect a treaty review/renovation process as a vehicle for implementing their inherent right of self-government.
12. This principle was articulated in *A.G. Ont. v. A.G. Can.* (Reference Appeal) [1912] A.C. 571, 583, in which the Judicial Committee of

the Privy Council said that "whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act".

13. *Partners in Confederation*, cited in note 2, p. 32.
14. The expression "each within its own jurisdiction" was added to make it clear that an Aboriginal government will exercise its authority within its jurisdiction. In our opinion, this is redundant and could be eliminated without taking away from the meaning of the statement.
15. Consensus Report, p. 17.
16. Testimony from Alex Christmas, President, Union of Nova Scotia Indians, to the Royal Commission on Aboriginal Peoples, 6 May 1993, Eskasoni, Nova Scotia.
17. Consensus Report, p. 13.
18. The contextual statement does not impose a certain political structure. This is an internal matter for Aboriginal peoples to determine and, once agreed upon internally, to demonstrate community support for the institutions and structures of government.
19. We do not mean to suggest that Aboriginal governments must wait for the conclusion of agreements in order to exercise jurisdiction. The Royal Commission on Aboriginal Peoples has already accepted this point in *Partners in Confederation* (cited in note 2, p. 36) where it was recognized that Aboriginal peoples could move immediately in areas of core jurisdiction without negotiated agreements. We do not doubt that this is the case as a matter of constitutional law. However, the path of negotiation is the path of social peace as well as the path that will not divert resources to the courts over abstract and complex legal battles.
20. For example, Treaty 6 requires the chiefs to maintain peace and order among their people and in the dealings of their people with non-Indians. To implement this agreement one would imagine that jurisdiction over the administration of justice would be required.
21. There are four self-government agreements: The Champagne and Aishihik First Nations Self-Government Agreement; the First Nation of Nacho Nyak Dun Self-Government Agreement; the

Teslin Tlingit Council Self-Government Agreement and the Vuntut Gwichin Self-Government Agreement. All four agreements were signed in Whitehorse on 29 May 1993, and all four have been published by Supply and Services Canada, under the authority of the Minister of Indian Affairs and Northern Development, under these titles.

22. Another example of a self-government agreement is the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27. The Sechelt model was path-breaking, but it was developed in the pre-Charlottetown era, so that its suitability in the post-Charlottetown era is questionable, and we note that many Aboriginal peoples have stated expressly that they do not want the Sechelt model.
23. The Umbrella Final Agreement between the government of Canada, the Council for Yukon Indians and the government of the Yukon was signed in Whitehorse on 29 May 1993. It was published by Supply and Services Canada under the authority of the Minister of Indian Affairs and Northern Development.
24. *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35; *First Nations (Yukon) Self-Government Act*, S.Y. 1993, c. xx; settlement legislation (to give effect to the land claims) was enacted at the same time: *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34; *Yukon Land Claim Final Agreements Act*, S.Y. 1993, c. xx.
25. The fact that both land claims and self-government agreements were concluded in the Yukon suggests that the resolution of land issues is closely connected to progress on self-government jurisdiction. This is important to remember when applying the Yukon model to other contexts.
26. The jurisdictional provisions are reproduced in Appendix 1.
27. *Construction Montcalm v. Minimum Wage Commission* [1979] 1 S.C.R. 754.
28. See A. Bissonnette, "Analyse posthume d'un accord mis à mort", *Recherches Amérindiennes au Québec* 80 (1993), pp. 83-84.
29. For a more complete analysis of the existing peace, order and good government provision, see P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (1992), chapter 17.

30. The *Sechelt Indian Band Self-Government Act*, cited in note 22, provides, by sections 37 and 38, that federal and provincial laws of general application apply to the band, its members and Sechelt lands. In the case of provincial laws, however, the laws of the band take priority. Thus, in the event of inconsistency between a provincial law and a band law, the band law is paramount. However, in the event of inconsistency between a federal law and a band law, the federal law paramount. The Sechelt Act is silent on the definition of inconsistency, so that the narrow express contradiction test would probably apply.
31. See Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System—Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services Canada, 1993).
32. The Yukon agreements do not recognize First Nations' jurisdiction over 'criminal law', which is now reserved exclusively to the federal government. Some First Nations may want at least concurrent jurisdiction over criminal law making, as well as the administration of justice, which now rests with provincial governments.
33. Indeed, current litigation — such as *Delgamuukw v. Attorney General of British Columbia* (1993) 104 D.L.R. (4th) 470 (B.C.C.A.), which involved more than 350 trial days, thousands of exhibits, and several months of appeal hearings — makes it clear that the burden placed on the courts to deal with these claims within conventional law is unworkable. The Court of Appeal in *Delgamuukw* expressed a very strong preference for political resolution of Aboriginal disputes. The Supreme Court of Canada, which has granted leave to appeal, has given the parties an 18-month delay in order to encourage them to reach a negotiated agreement.
34. See M.E. Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Interpretive Monopolies, Cultural Differences", *C.H.R. Yb.* 6 (1989-90), p. 3.
35. An appropriate dispute resolution process would need to be a product of agreement and would need to reflect Aboriginal culture and ensure Aboriginal representation.
36. *Constitution Act, 1867*, ss. 91(3), 92(2).

37. Under section 87 of the *Indian Act*, there is an exemption from federal and provincial taxes for "the personal property of an Indian or band situated on a reserve". Section 87 has been held to provide an exemption from sales taxes and income taxes for status Indians. The exemption is confined to reserves, and this has led to legal decisions attempting to define the nature of the connection with a reserve that is needed to qualify for the exemption. Section 87 applies only to federal and provincial (or territorial) taxes and would not preclude a First Nation from levying taxes on status Indians on reserves.

The four Yukon First Nations that have concluded land claims agreements have decided to give up the section 87 exemption (Council for Yukon Indians, *Umbrella Final Agreement*, 1993, clause 20.6) in return for a capital sum that constitutes compensation for the loss of the exemption. The buy-out of the exemption is delayed for three years to give the First Nation time to get ready for the introduction of taxes.

Section 87 provides a tax exemption for an *Indian Act* band, as well as for individuals. It goes without saying that, under self-government, the First Nation itself and its corporations should continue to be exempt from federal and provincial taxes. This is provided for in the *Sechelt Indian Band Self-Government Act*, cited in note 22, section 35, and in the Yukon First Nation self-government agreements, paragraph 15.0.

38. *Simon v. The Queen* [1985] 2 S.C.R. 1025, 1043.
39. Without constitutional protection, an intergovernmental agreement can be altered unilaterally by the federal Parliament: *Re Canada Assistance Plan* [1991] 2 S.C.R. 525.
40. Andrew R. Thompson, "Land Claim Settlements in Northern Canada", *Sask. L. Rev.* 55 (1991), p. 127.
41. The Yukon First Nation self-government agreements (as well as the Yukon land claims agreements) have been implemented by federal and territorial legislation, cited in note 24.
42. It is worth noting that in the United States many tribes have laws and procedures for addressing alleged conflicts of interests on the part of public office holders. The Navajo Nation has an Office of Conflicts and Ethics in Government that hears complaints by

members of the tribe and provides direct redress for violation of the Navajo Code of Ethics.

43. *RWDSU v. Dolphin Delivery* [1986] 2 S.C.R. 573.
44. Kent McNeil Contra, "Aboriginal Government and the Canadian Charter of Rights and Freedoms: A Legal Perspective", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994).
45. Hogg, *Constitutional Law of Canada*, cited in note 29, section 34.2(b).
46. The *Delgamuukw* litigation, described in note 33, is a case in point.
47. Perhaps with the platform of the Liberal Party of Canada ("Creating Opportunity", cited in note 3), we will see this kind of new direction. The platform recognizes the inherent right of self-government, although it does not detail an implementation plan or process. The Liberal government elected in 1993 on this platform has not yet taken steps to implement the inherent right.

APPENDIX 1
EXAMPLE FROM YUKON SELF-GOVERNMENT AGREEMENTS:
THE TESLIN TLINGIT COUNCIL SELF-GOVERNMENT AGREEMENT

PART III
TESLIN TLINGIT COUNCIL LEGISLATION

13.0 Legislative Powers

13.1 The Teslin Tlingit Council shall have the exclusive power to enact laws in relation to the following matters:

13.1.1 administration of Teslin Tlingit Council affairs and operation and internal management of the Teslin Tlingit Council;

13.1.2 management and administration of rights or benefits which are realized pursuant to the Final Agreement by persons enrolled under the Final Agreement, and which are to be controlled by the Teslin Tlingit Council; and

13.1.3 matters ancillary to the foregoing.

13.2 The Teslin Tlingit Council shall have the power to enact laws in relation to the following matters in the Yukon:

13.2.1 provision of programs and services for Citizens in relation to their spiritual and cultural beliefs and practices;

13.2.2 provision of programs and services for Citizens in relation to their aboriginal languages;

13.2.3 provision of health care and services to Citizens, except licensing and regulation of facility-based services off Settlement Land;

- 13.2.4 provision of social and welfare services to Citizens, except licensing and regulation of facility-based services off Settlement Land;
- 13.2.5 provision of training programs for Citizens, subject to Government certification requirements where applicable;
- 13.2.6 adoption by and of Citizens;
- 13.2.7 guardianship, custody, care and placement of Teslin Tlingit children, except licensing and regulation of facility-based services off Settlement Land;
- 13.2.8 provision of education programs and services for Citizens choosing to participate, except licensing and regulation of facility-based services off Settlement Land;
- 13.2.9 inheritance, wills, intestacy and administration of estates of Citizens, including rights and interests in Settlement Land;
- 13.2.10 procedures consistent with the principles of natural justice for determining the mental competency or ability of Citizens, including administration of the rights and interests of those found incapable of responsibility for their own affairs;
- 13.2.11 provision of services to Citizens for resolution of disputes outside the courts;
- 13.2.12 solemnization of marriage of Citizens;
- 13.2.13 licences in respect of matters enumerated in 13.1, 13.2 and 13.3 in order to raise revenue for Teslin Tlingit Council purposes;
- 13.2.14 matters necessary to enable the Teslin Tlingit Council to fulfil its responsibilities under the Final Agreement or this Agreement; and
- 13.2.15 matters ancillary to the foregoing.

13.3 The Teslin Tlingit Council shall have the power to enact laws of a local or private nature on Settlement Land in relation to the following matters:

- 13.3.1 use, management, administration, control and protection of Settlement Land;
- 13.3.2 allocation or disposition of rights and interests in and to Settlement Land, including expropriation by the Teslin Tlingit Council for Teslin Tlingit Council purposes;
- 13.3.3 use, management, administration and protection of natural resources under the ownership, control or jurisdiction of the Teslin Tlingit Council;
- 13.3.4 gathering, hunting, trapping or fishing and the protection of fish, wildlife and habitat;
- 13.3.5 control or prohibition of the erection and placement of posters, advertising signs, and billboards;
- 13.3.6 licensing and regulation of any person or entity carrying on any business, trade, profession, or other occupation;
- 13.3.7 control or prohibition of public games, sports, races, athletic contests and other amusements;
- 13.3.8 control of the construction, maintenance, repair and demolition of buildings or other structures;
- 13.3.9 prevention of overcrowding of residences or other buildings or structures;
- 13.3.10 control of the sanitary condition of buildings or property;
- 13.3.11 planning, zoning and land development;
- 13.3.12 curfews, prevention of disorderly conduct and control or prohibition of nuisances;

- 13.3.13 control or prohibition of the operation and use of vehicles;
- 13.3.14 control or prohibition of the transport, sale, exchange, manufacture, supply, possession or consumption of intoxicants;
- 13.3.15 establishment, maintenance, provision, operation or regulation of local services and facilities;
- 13.3.16 caring and keeping of livestock, poultry, pets and other birds and animals, and impoundment and disposal of any bird or animal maltreated or improperly at-large, but the caring and keeping of livestock does not include game farming or game ranching;
- 13.3.17 administration of justice;
- 13.3.18 control or prohibition of any actions, activities or undertakings that constitute or may constitute, a threat to public order, peace or safety;
- 13.3.19 control or prohibition of any activities, conditions or undertakings that constitute, or may constitute, a danger to public health;
- 13.3.20 control or prevention of pollution and protection of the environment;
- 13.3.21 control or prohibition of the possession or use of firearms, other weapons and explosives;
- 13.3.22 control or prohibition of the transport of dangerous substances; and
- 13.3.23 matters coming within the good government of Citizens on Settlement Land.

13.4 Emergency Powers

- 13.4.1 Off Settlement Land, in relation to those matters enumerated in 13.2, in any situation that poses an

Emergency to a Citizen, Government may exercise power conferred by Laws of General Application to relieve the Emergency, notwithstanding that laws enacted by the Teslin Tlingit Council may apply to the Emergency.

- 13.4.2 A person acting pursuant to 13.4.1 shall, as soon as practicable after determining that a person in an Emergency is a Citizen, notify the Teslin Tlingit Council of the action taken and transfer the matter to the responsible Teslin Tlingit Council authority, at which time the authority of the Government to act pursuant to 13.4.1 shall cease.
- 13.4.3 A person acting pursuant to 13.4.1 is not liable for any act done in good faith in the reasonable belief that the act was necessary to relieve an Emergency.
- 13.4.4 On Settlement Land, in relation to those matters enumerated in 13.2, in any situation that poses an Emergency to a person who is not a Citizen, the Teslin Tlingit Council may exercise power conferred by laws enacted by the Teslin Tlingit Council to relieve the Emergency, notwithstanding that Laws of General Application may apply to the Emergency.
- 13.4.5 A person acting pursuant to 13.4.4 shall, as soon as practicable after determining that a person in an Emergency is not a Citizen, notify Government or, where the person in an Emergency is a citizen of another Yukon First Nation, that Yukon First Nation, of the action taken and transfer the matter to the responsible authority, at which time the authority of the Teslin Tlingit Council to act pursuant to 13.4.4 shall cease.
- 13.4.6 A person acting pursuant to 13.4.4 is not liable for any act done in good faith in the reasonable belief that the act was necessary to relieve an Emergency.

- 13.4.7 Notwithstanding 13.5.0, in relation to powers enumerated in 13.3, Laws of General Application shall apply with respect to an Emergency arising on Settlement Land which has or is likely to have an effect off Settlement Land.

13.5 Laws of General Application

- 13.5.1 Unless otherwise provided in this Agreement, all Laws of General Application shall continue to apply to the Teslin Tlingit Council, its Citizens and Settlement Land.
- 13.5.2 Canada and the Teslin Tlingit Council shall enter into negotiations with a view to concluding, as soon as practicable, a separate agreement or an amendment of this Agreement which will identify the areas in which laws of the Teslin Tlingit Council shall prevail over federal Laws of General Application to the extent of any inconsistency or conflict.
- 13.5.2.1 Canada shall Consult with the Yukon prior to concluding the negotiations described in 13.5.2.
- 13.5.2.2 Clause 13.5.2 shall not affect the status of the Yukon as a party to the negotiations or agreements referred to in 13.6.0 or 17.0.
- 13.5.3 Except as provided in 14.0, a Yukon Law of General Application shall be inoperative to the extent that it provides for any matter for which provision is made in a law enacted by the Teslin Tlingit Council.
- 13.5.4 Where the Yukon reasonably foresees that a Yukon Law of General Application which it intends to enact may have an impact on a law enacted by the Teslin Tlingit Council, the Yukon shall Consult with the Teslin Tlingit Council before introducing the Legislation in the Legislative Assembly.

- 13.5.5 Where the Teslin Tlingit Council reasonably foresees that a law which it intends to enact may have an impact on a Yukon Law of General Application, the Teslin Tlingit Council shall Consult with the Yukon before enacting the law.
- 13.5.6 Where the Commissioner in Executive Council is of the opinion that a law enacted by the Teslin Tlingit Council has rendered a Yukon Law of General Application partially inoperative and that it would unreasonably alter the character of a Yukon Law of General Application or that it would make it unduly difficult to administer that Yukon Law of General Application in relation to the Teslin Tlingit Council, Citizens or Settlement Land, the Commissioner in Executive Council may declare that the Yukon Law of General Application ceases to apply in whole or in part to the Teslin Tlingit Council, Citizens or Settlement Land.
- 13.5.7 Prior to making a declaration pursuant to 13.5.6, the Yukon shall:
- 13.5.7.1 Consult with the Teslin Tlingit Council and identify solutions, including any amendments to Yukon Legislation, that the Yukon considers would meet the objectives of the Teslin Tlingit Council; and
 - 13.5.7.2 after Consultation pursuant to 13.5.7.1, where the Yukon and the Teslin Tlingit Council agree that the Yukon Law of General Application should be amended, the Yukon shall propose such amendment to the Legislative Assembly within a reasonable period of time.

13.6 Administration of Justice

- 13.6.1 The Parties shall enter into negotiations with a view to concluding an agreement in respect of the administration of Teslin Tlingit Council justice provided for in 13.3.17.
- 13.6.2 Negotiations respecting the administration of justice shall deal with such matters as adjudication, civil remedies, punitive sanctions including fine, penalty and imprisonment for enforcing any law of the Teslin Tlingit Council, prosecution, corrections, law enforcement, the relation of any Teslin Tlingit Council courts to other courts and any other matter related to aboriginal justice to which the Parties agree.
- 13.6.3 Notwithstanding anything in this Agreement, the Teslin Tlingit Council shall not exercise its power pursuant to 13.3.17 until the expiry of the time described in 13.6.6, unless an agreement is reached by the Parties pursuant to 13.6.1 and 13.6.2.
- 13.6.4 Until the expiry of the time described in 13.6.6 or an agreement is entered into pursuant to 13.6.1 and 13.6.2:
- 13.6.4.1 the Teslin Tlingit Council shall have the power to establish penalties of fines up to \$5,000 and imprisonment to a maximum of six months for the violation of a law enacted by the Teslin Tlingit Council;
 - 13.6.4.2 the Supreme Court of the Yukon Territory, the Territorial Court of Yukon, and the Justice of the Peace Court shall have jurisdiction throughout the Yukon to adjudicate in respect of laws enacted by the Teslin Tlingit Council in accordance with the jurisdiction designated to those courts by Yukon Law

- except that any offence created under a law enacted by the Teslin Tlingit Council shall be within the exclusive original jurisdiction of the Territorial Court of the Yukon;
- 13.6.4.3 any offence created under a law enacted by the Teslin Tlingit Council shall be prosecuted as an offence against an enactment pursuant to the Summary Convictions Act, R.S.Y. 1986, c. 164 by prosecutors appointed by the Yukon; and
- 13.6.4.4 any term of imprisonment ordered by the Territorial Court of the Yukon pursuant to 13.6.4.1 shall be served in a correctional facility pursuant to the *Corrections Act*, R.S.Y., 1986, c. 36.
- 13.6.5 Nothing in 13.6.4 is intended to preclude:
- 13.6.5.1 consensual or existing customary practices of the Teslin Tlingit Council with respect to the administration of justice; or
- 13.6.5.2 programs and practices in respect of the administration of justice, including alternate sentencing or other appropriate remedies, to which the Parties agree before an agreement is concluded pursuant to 13.6.1 and 13.6.2.
- 13.6.6 The provisions in 13.6.4 are interim provisions and shall expire five years from the Effective Date or on the effective date of the agreement concluded pursuant to 13.6.1 and 13.6.2, whichever is earlier. If the Parties fail to reach an agreement pursuant to 13.6.1 and 13.6.2 during the five year period then the interim provisions

shall extend for a further term ending December 31, 1999.

- 13.6.7 All new and incremental costs of implementing the interim provisions in 13.6.4 incurred by the Yukon shall be paid by Canada in accordance with guidelines to be negotiated by the Yukon and Canada.

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